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IN THE
Supreme Court of the United States

REX SHELBY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) As the Fifth Circuit held in conflict with decisions of the Sixth, Seventh, Ninth and Eleventh Circuits, whether a defendant must explain why a jury failed to return a verdict on factually related counts in order to invoke collateral estoppel to bar a successive trial that would raise the same alleged criminal transaction or occurrence as the acquitted counts?

2) Assuming a defendant, following acquittal in such a partial verdict, has the burden of reconciling acquittals with unanswered counts as part of the "practical framing" Double Jeopardy inquiry dictated, does defendant's burden reach to all arguments and inferences that *could be* made or drawn regardless of the government's theory and the facts in contention at trial, as the Fifth Circuit held in conflict with the practices of the Second, Ninth, and Eleventh Circuits?

PARTIES TO THE PROCEEDING

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit were Rex Shelby, Defendant-Appellant, and the United States of America, Plaintiff-Appellee. Joseph Hirko and F. Scott Yeager were also Defendants-Appellants in the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI

Rex Shelby respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 521 F.3d 367 and reprinted at App. 1a. The opinion of the United States District Court for the Southern District of Texas is reported at 447 F. Supp. 2d 750 and reprinted at App. 29a.

JURISDICTION

The judgment of the Fifth Circuit was entered on March 17, 2008. A petition for rehearing en banc was denied on April 17, 2008. App. 61a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISION

The Fifth Amendment provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

Rex Shelby is a software engineer. Shelby was charged with participation in a scheme to mislead the public markets about the functionality of software being developed by Enron Broadband Services ("EBS"), a business unit of the collapsed, publicly-traded energy company, Enron. The stock

scheme alleged in this case is unrelated to the well-publicized activities of the parent company that ultimately led to its demise.

Shelby and codefendants, Joseph Hirko and F. Scott Yeager, went to trial over fifty-four days with all three men facing numerous counts having a common core allegation: the men knew EBS software to be hopelessly flawed but nonetheless hid that information from the public and touted its prospects in order to raise the stock price so they could personally profit from trades. All three men were acquitted on multiple counts, but the jury failed to reach a verdict on many remaining counts.[1]

A. Shelby's arrival at and interest in Enron

In December 1998, Enron Communications, Inc. ("ECI") acquired Modulus, a software company that Shelby and his partner, David Berberian, had joined during its start-up. The final Modulus acquisition agreement specified cash payments to be paid out in installments and was conditioned on Shelby's continuing employment at ECI. As part of his employment compensation, he received private, non-tradable ECI stock options. In June 1999, ECI was made a "core business" of Enron Corporation and

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[1] Two other defendants, Kevin Howard and Michael Krautz, were tried with the three, but on an unrelated alleged accounting scheme regarding a transaction with Blockbuster. The first trial resulted in hung counts for these defendants. They were tried together a second time resulting in some guilty verdicts against Howard and all acquittals against Krautz. After reversal, 517 F.3d 731, Howard is set for a third trial in March 2009.

Shelby, along with other ECI shareholders, were forced to accept Enron stock interests ("ENE"),[2] in exchange for those in ECI. With this change in status, ECI also became a stand-alone division to allow Enron executives to directly manage it.

Shelby's options were set to vest in four annual installments from 1999 to 2002. Shelby's 1999 options vested on June 25, 1999 ("1999 Options"), but he did not exercise them immediately. In June 2000 and June 2001, Shelby received the second and third installments, exercised the options, and sold the resulting stock.

B. Events underlying the charges against Shelby

On January 20, 2000, Enron held its annual Analyst Conference ("2000 Analyst Conference"). The EBS presentation at this event forms the basis of the securities fraud counts against Shelby, Hirko, and Yeager. As to Shelby, the government made much issue of a short video, identified as "Shelby 2," where he described the evolving capabilities of the Broadband Operating System, a series of software programs that included InterAgent, a product Modulus developed. There was another video, "Shelby 1," in which Shelby described the Enron Intelligent Network, a collection of hardware and software spread around the country.

Thereafter, in early 2000, EBS sent out several press releases touting its technology services and

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[2] Enron Corporation stock will be referred to by its trading symbol, ENE.

business prospects. Four, dated January 31, March 30, April 11, and May 15, were the basis for the wire fraud counts against Hirko, Yeager, and Shelby. The jury saw both videos and received all of the press releases.

After the 2000 Analyst Conference and during the time of the charged press releases, Shelby exercised his vested 1999 Options as the price rose well above the strike price, selling shares on January 21, February 1, and March 22. While ENE's price had hovered around the option strike price of $38.50[3] for several months, it increased its value by about 51% from the end of December 1999 to the day *before* the Analyst Conference, it increased again during the day of the conference, and it continued a general rise after the conference and throughout most of 2000 peaking above $80 per share in August and September. Shelby sold his 2000 Options in June and July when the price was around $70 per share. Tr. 9209-18. These early 2000 and summer 2000 sales were the basis of Shelby's insider trading counts.

All proceeds from Shelby's stock sales were rolled into money market accounts. Shelby moved some funds derived from his 2000 Options sales into different money market accounts in 2002, after he was no longer at Enron. These transfers were the basis of the money laundering counts against him.

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[3] The strike price was $77 before the August 16, 1999, two-for-one stock split. Shelby also received a small amount of restricted shares which were granted on the same schedule as the options.

C. Acquittal, Post-verdict Motions, and Appeal

The linchpin in the indictment against Shelby and his colleagues alleged that they had made false and misleading statements in order to mislead the investing public about the technological capabilities, value, revenue and business performance of EBS. The indictment further alleged that the Defendants executed their scheme by causing Enron to issue false press releases and making false statements to analysts, selling stock to enrich themselves. App. 40a-41a.

At trial, most of the testimony about Shelby, Hirko, and Yeager centered on the functionality of EBS's technology. The government alleged that Shelby made false statements in videos shown to the analysts, especially Shelby 2. However, the government suffered several significant set-backs at trial. The government's chief witness, Ken Rice, a former co-defendant who had made a plea deal with the government to testify against the Defendants, testified at length about the projection of the Shelby 2 video to the analysts. He was forced to admit during cross-examination that the video was never played and that he had been mistaken in so testifying.

Shelby waived his Fifth Amendment rights and testified at trial admitting his stock sales but vigorously contesting the government's core factual allegation that he had believed EBS's software to be hopeless at the time the public was being told of its potential. He also defended his statements about the state of the EBS technology, including those in

Shelby 2, maintaining that they were all true and accurate, and that any problems with the software were normal software development issues any company faces and all in the technology sector expect.

Shelby also testified that he sold his stock because he was uncomfortable being in the stock market at all, and that since he was inexperienced in the stock market he sold when Berberian (who held the same sequence of options) advised him to do so. The government argued and purported to provide evidence that the flaws with software became even more clear as time went on, cross-examining Shelby extensively on this theory.

Late in the afternoon of the fourth day of jury deliberations, the jury indicated to the judge that it was deadlocked. At 3:50 p.m. the judge gave the jurors an Allen charge, but directed them to work only until the end of the day — a mere 70 minutes later — then deliberations could end. Tr. 13,710-14. Not surprisingly, the jury returned at 5 p.m. with a partial verdict. Tr. 13,717-25.

The court accepted the jury's partial verdict in which it had acquitted all three defendants as to every charge on which a verdict had been reached. In particular, the jury acquitted Shelby in connection with the later-in-time insider trading counts, though it did not reach a verdict with respect to earlier trades. Tr. 13,727-28. In response to a Rule 29 motion to acquit, the district court dismissed the money laundering and wire fraud counts, as the money laundering counts arose from the acquitted insider trading counts and there was no evidence

presented that Shelby participated in the challenged press releases.

Shelby moved to dismiss the remaining securities fraud and insider trading counts and to prohibit the introduction of evidence underlying the acquitted counts on collateral estoppel grounds, reasoning that the acquittal of the later stock trades, combined with the evidence and argument that the software's failings only became more obvious as time went on, precluded any retrial of the remaining issues, as all of them depended on a finding that Shelby knew the software to be flawed and participated in a scheme to cover up the failings.

The district court denied Shelby's motion, finding the insider trading and wire fraud acquittals to be based on the "use" elements applicable to both charges, adopting arguments related to Shelby's "use" of inside information that were not made by the government at any point during the trial and that were contrary to the court's instructions to the jury that "use" of inside information need only be "a factor" in the decision to sell.

The Fifth Circuit affirmed, employing the same theory as the district court that the jury could have decided that Shelby did not "use" inside information in the sale of the 2000 Options but could have done so in the earlier-in-time sale of the 1999 Options, particularly since those options were not exercised until some months after they vested. The Court discounted Shelby's argument that there was no evidence or argument at trial concerning any such timing distinction by finding the distinction "obvious" and noting that the jury could have made it "on its

own." App. 11a, n.11. The Court also reasoned that Shelby could have sold his 1999 Options in late 1999 rather than waiting for the stock price to rise. App. 10a-11a & n.10. The Fifth Circuit's decision leaves Shelby and the other Defendants to another trial to face the same theory that they harbored unspoken doubts about the software's viability, affording no repose from the earlier acquittals.

REASONS FOR GRANTING THE PETITION

This Court has held that the doctrine of collateral estoppel is embraced within the Double Jeopardy Clause. *Ashe v. Swenson*, 397 U.S. 436, 444 (1970). *Ashe* set out the basic notion that the defendant bears the burden of proving what the first jury necessarily decided, directing that this review be conducted with "realism and rationality":

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine *the record of a prior proceeding*, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' The inquiry 'must be set in *a practical frame* and viewed with an eye to *all the circumstances of the proceedings*.'

Ashe, 397 U.S. at 444 (emphasis added and internal citation omitted). This Court has only twice reviewed

the issue of the proper methodology for a criminal collateral estoppel analysis.[4] Now, there is a growing disagreement in the circuit courts regarding unanswered counts in partial verdicts.

Here, the Fifth Circuit required all of the Defendants to explain the jury's failure to reach decisions on the hung counts, in addition to reasoning what the jury must have decided given the facts at issue at trial on the acquitted counts. Contrary to the Fifth Circuit's decision in this case, several circuits have read *Ashe* to require the defendant in a partial verdict case to account only for the decisions the jury actually made. *United States v. Ohayon*, 483 F.3d 1281, 1286-89 (11th Cir. 2007) (a reviewing court should "ask what the record tells us about the basis for an acquittal" not "search for the basis of a mistried count"); *accord United States v. Romeo*, 114 F.3d 141, 144 (9th Cir. 1997); *United States v. Bailin*, 977 F.2d 270, 279 (7th Cir. 1992); *see also United States v. Frazier*, 880 F.2d 878 (6th Cir. 1989).

Likewise, several circuits have construed *Ashe*'s directive for a "practical framing" of the inquiry into what a jury actually decided to focus on the arguments, instructions, and evidence presented to the jury. *Ohayon*, 483 F.3d at 1286-89; *Bailin*, 977 F.2d at 280-81; *United States v. Seley*, 957 F.2d 717 (9th Cir. 1992); *United States v. Citron*, 853 F.2d 1055, 1060 (2d Cir. 1988). These circuits reject the notion that the reviewing court can or should

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[4] *Schiro v. Farley*, 510 U.S. 222 (1994); *Dowling v. United States*, 493 U.S. 342 (1990).

speculate about what the jury might have done or why it might not have returned other verdicts.

By elevating the burden on the acquitted defendant to explain why a jury did not arrive at a verdict as part of the inquiry into what it actually decided *and* forcing the defendant also to account for arguments and inferences that were not actually attempted at trial, the Fifth Circuit has created a conflict among the circuits and elevated the burden beyond the simple, "practical" approach dictated in *Ashe*. Indeed, the Fifth Circuit's decision in this case makes collateral estoppel virtually unavailable in any criminal case that does not result in a complete acquittal on all charged counts. The Fifth Circuit's decision also gives the government an incentive to over-indict, as the mere presence of multiple counts increases the prospects for a successive prosecution and the opportunity for the government to take a mulligan.

I. The Fifth Circuit Erred and Exacerbated the Conflict Among the Circuits When it Required a Defendant to Assume the Burden of Explaining the Jury's Failure to Arrive at a Complete Verdict.

As part of the Fifth Amendment guarantee against double jeopardy, collateral estoppel is "a matter of constitutional fact" that must be decided "through an examination of the entire record." *Ashe*, 397 U.S. at 442-43. *Ashe* sought to avoid a hyper-technical test and instead impose a common-sense, case-specific analysis. In that case this Court reasoned that any more restrictive a test would amount to a rejection of the collateral estoppel rule in

criminal cases. *Ashe*, 397 U.S. at 444, 444 n.9. For example, if a reviewing court were able to assume that a jury disbelieved substantial and uncontradicted evidence, "the possible multiplicity of prosecutions is staggering." *Id.* at 444 n.9 (quoting Mayers & Yarbrough, *Bix Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 38 (1960)).

A. This Court's Decision in *Ashe v. Swenson* Recognized the Preclusive Doctrine of Collateral Estoppel as Part of the Double Jeopardy Bar and Put the Burden on the Defendant to Establish What the Jury Necessarily Decided.

Under *Ashe*, the Defendant bears the burden to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding. *Schiro v. Farley*, 510 U.S. 222, 233 (1994). The court, however, must review the *entire* record to determine whether the jury could have grounded its verdict in an issue other than the one the Defendant seeks to foreclose. *Id.* at 236. Which issues were significant at trial compared to those not seriously in dispute may reveal what a rational jury actually decided. *Id.* at 235. The notion of what the jury "could have" decided is, of course, tempered by the practical framing of the review of the entire record of the prior proceeding. *Ashe*, 397 U.S. at 444. Thus, the court considers what questions the jury was asked in the charge and what facts and arguments were before this particular jury that returned the verdicts.

B. The Sixth, Seventh, Ninth, and Eleventh Circuits Have Correctly Held that the Burden Recognized in *Ashe* Does Not Reach to Indecision.

With the opinion below, the Fifth Circuit joins the minority of circuits that require defendants to explain hung counts along with acquitted counts before an acquittal will be given preclusive effect. Most circuits that have considered the issue of partial verdicts of acquittal directly reject the idea that a defendant's burden reaches beyond the actual decision and also requires a justification for hung counts. *See Ohayon*, 483 F.3d 1281; *Bailin*, 977 F.2d 270; *Romeo*, 114 F.3d 141; *see also Frazier*, 880 F.2d 878, 882-83. While the D.C. Circuit has required logical reconciliation of hung counts, and had that reasoning followed by the First Circuit, these courts did so with minimal analysis and remain in the minority. *See United States v. White*, 936 F.2d 1326 (D.C. Cir. 1991), *cited by United States v. Aguilar-Aranceta*, 957 F.2d 18, 24 (1st Cir. 1992).

The government has taken yet a third approach, arguing without success in multiple cases that this Court's decision in *United States v. Powell* forecloses application of collateral estoppel or double jeopardy where any count remains unanswered. In *Powell*, the jury returned a mixed, complete verdict of guilty and not guilty on multiple counts that was truly, internally, and logically "inconsistent." 469 U.S. 57, 65 (1984). The defendant sought to benefit from the inconsistency, arguing that collateral estoppel barred the application of the conviction against her even though it was returned by the same jury that acquitted her on some counts. This Court rejected

that assertion because with the inconsistent verdict it was not clear "whose ox had been gored." That is, when the jury, whether because of "mistake, compromise, or lenity" issued a logically inconsistent verdict, no reviewing court could ever ascertain with any certainty what the jury "really meant." 469 U.S. at 67-68.

Powell's refusal to speculate on the unknowable is exactly why a reviewing court should not speculate on why a jury could not agree. *See Romeo*, 114 F.3d at 144 (rejecting the government's argument based on *Powell*). The government has urged its theory that *Powell* precludes the application of collateral estoppel to partial verdicts to multiple circuit courts but few have accepted. A mere failure to decide other counts does not result in "inconsistency."

The Seventh Circuit's reading of *Ashe* is better reasoned and garners the support of the majority of circuits to address the issue. *United States v. Bailin*, 977 F.2d 270 (7th Cir. 1992). The first trial in *Bailin* consisted of 195 counts of various white-collar crimes against multiple defendants arising "from only one criminal scheme." 977 F.2d at 278 n.10. The jury returned a verdict of acquittals and hung counts, but no convictions. The unanimous court reasoned that the government cannot prevail with an argument "that an acquittal on one count, coupled with a hung jury on a related count, makes it impossible to determine that the jury necessarily established any common element of those two offenses against the government." *Id.* at 279. A jury's failure to reach a verdict is too inconclusive to qualify as "inconsistent' for the purposes of issue preclusion. *Id.* at 280. Thus, any facts necessarily decided by the jury must

be taken without regard to the jury's failure to reach a decision on other counts. The Seventh Circuit's view has been followed by the Eleventh, Ninth, and Sixth Circuits.[5]

The Fifth Circuit's opinion here conflicts with *Bailin* and those circuits following it both in reasoning and result. The court required all three Defendants, as part of their burden to establish the application of collateral estoppel, to explain why the jury hung on some counts, rather than begin with the acquitted counts and refer to the issues in dispute at trial. As in *Bailin*, the government chose a trial strategy of alleging one, singular scheme without differentiation over time or among the three defendants.[6] As in *Bailin*, when the jury acquitted on multiple counts it necessarily rejected the government's factual allegations of a unified scheme.

Jurors should be taken at their word — without conjecture as to what they did ***not*** decide. The *Ashe* inquiry is a functional one looking only to what the jury actually decided when it reached a verdict, not what it could not decide. Courts may not presume a jury misbehaved or failed to follow its instructions. If a reviewing court approached every acquittal suspecting the acquittal was the result of nullification,

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[5] *Ohayon*, 483 F.3d at 1288-89; *Romeo*, 114 F.3d at 144; *Seley*, 957 F.2d at 723, *Frazier*, 880 F.2dd at 882-83.

[6] *See Bailin*, 977 F.2d at 278 & n.10; *see also United States v. Leach*, 632 F.2d 1337, 1341 (5th Cir. 1980), *cf. United States v. Brown*, 983 F.2d 201 (11th Cir. 1993) (acquittal of one financial scheme did not bar prosecution of a second scheme).

then acquittals would never be said to have settled questions of ultimate fact and *Ashe* would mean nothing at all. *See Romeo*, 114 F.3d at 144; *Seley*, 957 F.2d at 723. *Ashe* warned that too restrictive a test would eliminate any collateral estoppel protections.

Finally, this Court has refused to make inferences from a jury's failure to answer a count when reviewing the collateral estoppel effect of a conviction in a partial verdict. In *Schiro*, the defendant argued that the jury's failure to answer a count for "knowingly" killing a woman while finding him guilty of killing her while committing the crime of rape meant that the jury must have found he did not intentionally murder. 510 U.S. at 227, 114 S. Ct. at 788. This Court rejected that argument, refusing to "draw any particular conclusion from [the jury's] failure to return a verdict on Count I." 510 U.S. at 234, 114 S. Ct. at 791.

The D.C. Circuit is alone in explicitly holding that a hung count is "inconsistent" with an acquittal, and in holding that had the jury found an ultimate issue underlying both counts in the defendant's favor, the jury would have acquitted on both. *White*, 936 F.2d at 1329. Citing *White*, the First Circuit follows its reasoning that a rational jury would have acquitted on the hung count had it really found the underlying fact in the defendant's favor. *Aguilar-Aranceta*, 957 F.2d at 24. Neither court recognizes in their respective opinions the issues pointed out by the majority circuits: that a hung count is no decision at all, and may result from a variety of factors many of which are unrelated to the merits or unknowable. If the defendant is required to reconcile

a hung count with an acquittal it can always be said that had the jury really found the common underlying fact in the defendant's favor it would have acquitted on both counts. Under such a formulation, the doctrine of collateral estoppel will have no application at all, just as *Ashe* warned would happen with too restrictive, or perhaps illogical, a test.

C. The Fifth Circuit's Analysis in Failing To Find That Collateral Estoppel Bars Re-Litigation of the Factually-Similar Claims Against Shelby Presumes That There Was a Reason Behind the Hung Counts.

The jury returned a verdict of acquittal on multiple counts against Shelby, along with Hirko and Yeager. Despite the government's and the Fifth Circuit's preference in focusing on hung counts in their analysis, a verdict of acquittal is a constitutionally significant development that simply cannot be on equal footing with a hung count. *See Ashe*, 397 U.S. at 442-43. "[T]he law attaches particular significance to an acquittal."[7] By giving as much weight to the hung counts as to the acquittals, the Fifth Circuit erred in its analysis and put itself on the minority side of a circuit split.

The Fifth Circuit's opinion openly wrestles with the issue of whether and how to consider the hung counts in its analysis of Yeager's appeal. App. 22a-25a. But in Shelby's and Hirko's cases, the Court simply requires that the Defendants explain why

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[7] *United States v. Scott*, 437 U.S. 82, 91 (1978).

some counts were hung and others acquitted, then concludes that since the jury did not acquit on all counts, it must have found facts contrary to the defendants' position. App. 10a, 17a-18a.

In Shelby's case, the Fifth Circuit followed the district court's reasoning that the jury must have found that Shelby did not "use" inside information when he made his Summer 2000 trades, but could have used inside information when he made his Early 2000 trades. App. 10a. The Fifth Circuit declares the timing distinction "obvious" and "one that the jury could have made on its own" to accept Shelby's defense for one set of counts "and not the other." App. 11a, n.11. By comparing the acquitted counts with the hung counts the Fifth Circuit in fact sought to rationalize hung counts with the acquittals.

Here, at trial, the government's theory of the case hinged on a singular, factual "pump and dump" scheme. The government alleged a single insider-trading scheme, arguing in closing argument that that scheme was "the backdrop that underlies this entire case." Tr. 13,190. Much like the government's single, unified accusation of a monolithic, ongoing scheme to commit securities fraud, Shelby defended himself with a single, unified theme against all counts. Shelby argued that the software and network in fact "worked," that the representations made at the 2000 Analyst Conference were accurate, and that there was no scheme or intent to defraud. In fact, all three Defendants disputed the existence of any falsehoods about the technology. The vast majority of the trial testimony was about functionality of the technology (not the motivation of the stock sales). Since the functionality of the technology and the

existence of any scheme were the main disputed issues, and since there were twenty-five acquittals, it is hard to imagine that a rational jury would have accepted the government's theory of the case and acquitted on so many counts.

Another problem with the Court's speculation in reconciling hung counts is, as this Court noted in *Powell* when discussing inconsistent verdicts, it is not clear whose ox has been gored. If the jury in fact reasoned as the Court conjectures it did, determining that Shelby did not use the illicit information in the later sales but did use it in the earlier sales, then the jury would have convicted Shelby of the earlier counts.

The Fifth Circuit — admittedly in the case of Yeager and in practice in the cases of Shelby and Hirko — considers the hung counts in its analysis. While the Fifth Circuit claims to not accept the government's interpretation of *Powell*, again in practice it does so by requiring the defendants to explain the hung verdicts, precluding the application of collateral estoppel.

D. The Fifth Circuit's Rule Would Encourage Over-indicting and Make Collateral Estoppel Practically Unavailable in Any Case Involving Partial Verdicts.

Nearly one hundred years ago, the government urged the Court to consider double jeopardy as some lesser form of *res judicata* so that criminal cases would not provide the same protections as the civil collateral estoppel doctrine. Writing for the court, Justice Holmes quite directly rejected the proposal:

> It seems that the mere statement of the position should be its own answer. It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.

United States v. Oppenheimer, 242 U.S. 85, 87 (1916). When it comes to the effect of an adjudication in a criminal matter, the adjudicated matter is final; in this, the civil and criminal law are in agreement. *Id.* at 88. Justice Holmes explicitly noted that the doctrines protecting the finality of adjudicated matters apply with or without Double Jeopardy Clause protections:

> The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice in order, when a man once has been acquitted on the merits, to enable the government to prosecute him a second time.

Id. at 88 (citation omitted). Thus, in criminal cases, collateral estoppel reaches beyond the Double Jeopardy Clause, while encompassing its protections, to included fundamental principles of justice to place the defendants at least on par with their civil counterparts.

The policy underlying the Double Jeopardy Clause and its collateral estoppel corollary requires the government to live with its strategy choices at

trial, put on its strongest case the first time, and not get a second chance should a chosen strategy not succeed as the government should not have the "opportunity to hone its presentation on those issues which have already been decided against it."[8]

Indeed, if collateral estoppel is not practically available in a case involving partial verdicts the government has a perverse incentive to indict broadly in hopes of securing, if not a victory, then at least a "mulligan" on the basis of the unanswered count.[9] Given the enormous increase in federal statutory offenses over the last several decades, the possibility for overlapping counts is great. *See Ashe*, 397 U.S. at 445, n.10.

Trials as notorious and complicated as the Enron trials greatly exacerbate that burden on defendants. *See Bailin*, 977 F. 2d at 278 n.10 (lamenting the years the defendants remain in jeopardy in a 195-count securities fraud case based on one criminal scheme when the government was unable to secure convictions in the first trial). The longer the government is given to try, try, and try again, the longer the acquitted defendants are punished without any conviction.

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[8] *Bailin*, 977 F.2d at 277-78. *See United States v. Castillo-Basa*, 483 F.3d 890, 893 (9th Cir. 2007); *United States v. Cavanaugh*, 948 F.2d 405, 417 (8th Cir. 1991) (applying double jeopardy to bar retrial when the government's deliberate trial strategy did not succeed as defendants should not have to "run the gauntlet" a second time).

[9] *Castillo-Basa*, 483 F.3d at 893.

II. *Ashe* Announced a Pragmatic and Practical Standard Addressed to the Evidence and Arguments the Jury Actually Heard — Not Conjecture and Speculation as to What the Jurors Might Have Been Thinking.

The collateral estoppel doctrine requires a fact-specific and context-specific analysis to determine what a jury necessarily decided, if such a determination can be fairly made. A court should not indulge in speculation outside the record of a particular case, whether doing so benefits the defendant or the government.

A. Both *Ashe* and *Schiro* require a record-specific test.

Collateral estoppel analysis is best approached on a case-by-case basis, with an analysis based on "realism and rationality." *Ashe*, 397 U.S. at 444. In *Schiro*, for example, the defendant had been convicted of a lesser murder charge but the jury was hung on intentional murder. This Court held that the hung count did not imply a fact finding of no intent on the part of the defendant because the jury in that trial had been instructed to only return one verdict. 510 U.S. at 233. In addition, during Schiro's trial, his intent to kill was not a significant, contested issue, nor was there any point in the transcript where the defense even discussed intent. 510 U.S. at 235. Thus, for the purposes of collateral estoppel, this Court looked at the particular question asked of the jury and the context of the issues actually litigated during the trial to determine whether a fact issue was necessarily decided.

A collateral estoppel jurisprudence that does not consider hung counts when it inures to the benefit of the government but does insist on considering hung counts when it would increase the burden on the defendant runs counter to the purposes behind the Double Jeopardy Clause and the fundamental principles of justice behind collateral estoppel. The very nature of hung counts as a failure to make a decision also undermines the government's position. If a defendant cannot benefit from a mixed, inconsistent verdict under *Powell*, the government should not prevail with the analogous argument that an acquittal coupled with a hung count makes it impossible to determine what the jury decided. *See Bailin*, 977 F.2d at 279.

B. The Second, and Eleventh Circuits Have Read *Ashe* and *Schiro* to Require an Examination of the Arguments Actually Made and the Facts Actually Contested to Determine What the Jury Decided.

In *Ohayon*, the Eleventh Circuit rejected the government's argument about what the jury may have thought because to do so would be "speculating" which the reviewing court is "forbidden from doing." 483 F.3d at 1287. There, the court held the government to the way it presented its case to the jury. *Id.* Moreover, the court looked closely to the particular record, giving credence to a question the jury posed about the exact issue the defendant argued was decided. *Id.* The Eleventh Circuit warned that speculation, possible jury error, and possible jury nullification play no part in collateral estoppel review because the reviewing court must

presume a rational jury that follows the rules. *Id.* at 1288.

The Second Circuit has also held the parties to the theories and fact issues that were actually tried. *See Citron*, 853 F.2d at 1060 (rejecting the argument that a convicted count was factually based on a minor issue rather than the main factual contention at trial). The Ninth Circuit also follows *Ashe's* directive to focus on the record of a particular case. *Seley*, 957 F.2d at 721 (barring retrial and rejecting the government's arguments that were not made at trial nor supported by evidence submitted at trial).

C. The Fifth Circuit's Test Reaches Well Beyond *Ashe* and Makes Collateral Estoppel Effectively Unavailable in Multi-Count Trials.

Here, the Fifth Circuit found that the jury could have acquitted Shelby of his later-in-time insider trading counts and not his earlier counts, because those earlier sales took place well after his options vested. The court supports its conclusion by noting that the stock price had risen above the strike price by November 1999, a few months after the 1999 Options vested but a few months before Shelby exercised them and sold the resulting stock. In so reasoning the court ventures into facts and argument not before the jury.

The Fifth Circuit found the timing distinction "obvious" and reasoned that the jury could have made the distinction "on its own." App. 11a, n.11. However, a court cannot follow *Ashe*'s framework for a practical analysis and conjecture what a jury might have come up with "on its own."

The court also declared that the evidence indicated that the stock "had value" in late 1999. App. 10a-11a, n.10. But the price hovered a few dollars above the strike price in 1999, even dipping below it in November. It was not until a week before the 2000 Analyst Conference that the price broke $50 a share (a price where the net would have still been substantially below the 25% of gross sale net the government's expert testified resulted from the allegedly illicit sales here).[10]

The government offered no evidence or argument at trial to differentiate Shelby's state of mind at the time he sold stock under the hung counts versus under the acquitted counts. Instead, the prosecution argued that false information was repeated (and if anything compounded) as time progressed.

The jury charge asked simply whether any inside information was "a factor" in the decision to sell stock. That is, while the government must prove that the defendant sold "because" of the inside information, the government need not prove that the defendant sold "solely because of the material, non-public information." Tr. at 13,663-64. The Fifth Circuit presumes that Shelby was engaged in the

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[10] Tr. 6747-48. The Fifth Circuit's presumption about how a rational jury would view the earlier stock sales directly contradicts uncontroverted testimony about the economics of stock options sales. Multiple witnesses testified to the jury what a "strike price" is and how options work. Witnesses explained that traders must pay the strike price, but must also pay taxes and trading fees. Thus, exercising an option when the price is at or just above the strike price yields no or little profit.

most significant financial and legal development of modern times yet forgot about the scheme to defraud millions of people, or, as the insider-trading scheme grew and threatened to explode the business, Shelby kept his knowledge so far back in his mind that it was not even "a factor" in his decision to sell. Either contention is ill-suited for the "practical framing" *Ashe* directs. When there is no evidence or argument at trial to explain a change in state of mind over time, courts cannot presume one, after the fact.[11]

By fashioning a standard that operates like a backward-looking version of civil summary judgment — requiring the defendant to disprove any inference a jury might have drawn from the evidence, regardless of the probability the jury likely actually did so in view of the theory and evidence presented below — the Fifth Circuit makes collateral estoppel practically impossible in any case where a defendant would not have been entitled to an acquittal at the close of the evidence.

CONCLUSION

The petition for writ of certiorari should be granted.

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[11] *De La Rosa v. Lynaugh*, 817 F.2d 259, 265-66, 266 n.13 (5th Cir. 1987) (applying collateral estoppel to bar retrial when there was no legally sufficient evidence indicating a change in state of mind); *cf. Frazier*, 880 F.2d at 884 85 (acquittals of earlier counts does not collaterally estop retrial of later, hung counts as the jury could have found that the defendant formed his intent to defraud at the later date).

Respectfully submitted,

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July 2008

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[FILED:
March 17, 2008]

No. 06-20321

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

SCOTT YEAGER

Defendant - Appellant

Consolidated with
Case No. 06-20593

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

REX SHELBY

Defendant - Appellant

Consolidated with

Case No. 06-20691

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JOSEPH HIRKO

Defendant - Appellant

Appeals from the United States District Court for the Southern District of Texas

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Before HIGGINBOTHAM, GARZA and BENAVIDES, Circuit Judges.

FORTUNADO P. BENAVIDES, Circuit Judge:

This is a consolidated interlocutory appeal of an order denying a motion to dismiss a government indictment under the doctrine of collateral estoppel.[1] In 2005, Defendants F. Scott Yeager, Joseph Hirko, and Rex Shelby ("Defendants") were tried on various counts for their actions while employed at Enron Broadband Services ("EBS"). The jury acquitted

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[1] We have jurisdiction over this case under 28 U.S.C. § 1291. *Abney v. United States*, 431 U.S. 651, 659, 97 S. Ct. 2034, 52 L.Ed.2d 651 (1977) ("Although it is true that a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds lacks the finality traditionally considered indispensable to appellate review, we conclude that such orders fall within the small class of cases that Cohen [sic] placed beyond the confines of the final-judgment rule.") (internal quotation marks omitted).

Defendants on some of these counts but hung on others, after which the United States ("Government") again indicted Defendants on some of the mistried counts. Contending that the acquitted counts collaterally estopped the Government from pursuing the mistried counts, Defendants moved to dismiss the indictment. The district court denied the motion. For the reasons below, we AFFIRM.

I.

This case arises from the collapse of Enron Corporation ("Enron") and its subsidiaries. Defendants were senior executives at EBS, Enron's broadband and telecommunications unit. In November 2004, Defendants were indicted on various counts of: (1) conspiracy to commit securities and wire fraud, (2) securities fraud, (3) wire fraud, (4) insider trading, and (5) money laundering.[2]

In 1998, Enron began developing an "intelligent" telecommunications network and associated software. The indictment alleged that Defendants purposely sought to deceive the public by making false statements about EBS" progress and financial condition. According to the indictment, Defendants

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[2] Defendants Yeager, Hirko, and Shelby were all charged with one count of conspiracy to commit securities and wire fraud, 18 U.S.C. § 371, one count of securities fraud, 15 U.S.C. §§ 78j(b) and 78ff, and four counts of wire fraud, 18 U.S.C. § 1343. In addition, Yeager was charged with 20 counts of insider trading and 99 counts of money laundering. Shelby was charged with eight counts of insider trading and six counts of money laundering. Hirko was charged with 7 counts of insider trading and 14 counts of money laundering.

made false claims in various press releases beginning in 1999 and at Enron's annual analyst conference in January 2000. The indictment also charged Defendants with selling millions of dollars of Enron stock while making these false statements.

In July 2005, the jury acquitted Defendants on some counts but could not reach a verdict on others. Yeager was acquitted of the conspiracy, wire fraud, and security fraud counts. Hirko was acquitted of some of the insider trading and money laundering counts; and Shelby was acquitted of some of the insider trading counts. Because the jury hung on the remaining counts, the district court declared a mistrial on those counts. The district court also granted Shelby's Rule 29 motion for judgment of acquittal on the money laundering counts and the wire fraud counts.[3]

In November 2005, the Government obtained new indictments against Defendants. These post-trial indictments recharged Shelby and Hirko with all of the mistried counts and recharged Yeager with some of the mistried insider trading and money laundering counts. The indictments recharged Yeager with five counts of insider trading and eight counts of money laundering; Hirko with one count of conspiracy, one count of securities fraud, and five counts of insider trading; and Shelby with one conspiracy count, one securities fraud count, and four counts of insider trading. Shelby and Hirko moved to dismiss all of the

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[3] Rule 29 of the Federal Rules of Criminal Procedure states in relevant part: "If the jury has failed to return a verdict, the court may enter a judgment of acquittal." Fed. R. Crim. P. 29(c)(2).

recharged counts, except for the conspiracy counts against Hirko and Shelby and the 2001 insider trading counts against Hirko. Yeager moved to dismiss all of the mistried insider trading and money laundering counts.[4] Defendants contend that their previous acquittals collaterally estopped the Government from pursuing these charges. The district court denied their motion.

II.

Whether collateral estoppel bars a subsequent criminal prosecution is a question of law that we review *de novo*. *United States v. Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997).

III.

The Fifth Amendment's guarantee against double jeopardy incorporates the collateral estoppel doctrine. *Ashe v. Swenson*, 397 U.S. 436, 443-44, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). Collateral estoppel "means

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[4] In addition to the recharged counts, Yeager moved to dismiss the mistried counts in the indictment the Government secured before the trial ("the old indictment") but not in the November 2005 indictment ("the new indictment"). The Government maintains that it can prosecute Yeager under both the new and old indictments and, therefore, can retry him on all of the insider trading and money laundering counts. Therefore, Yeager moved to dismiss both indictments, contending that collateral estoppel precludes the Government from retrying him on any of the mistried counts. Because the Government does not dispute Yeager's contention that the collateral estoppel analysis is the same for all of the mistried counts, we do not differentiate between the two indictments here.

simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443, 90 S.Ct. 1189. As traditionally understood, the Double Jeopardy Clause precludes multiple prosecutions and multiple punishments for the same offense. *See United States v. Odutayo,* 406 F.3d 386, 392 (5th Cir. 2005). *Ashe,* however, limits successive prosecution of defendants, not for the same offenses but for different offenses.[5] After an acquittal, *Ashe* bars the government from prosecuting defendants on a different charge "if one of the facts *necessarily determined* in the former trial is an essential element of the subsequent prosecution." *Brackett,* 113 F.3d at 1398. Defendants asserting collateral estoppel carry the burden to make this showing. *Dowling v. United States,* 493 U.S. 342, 350, 110 S. Ct. 668, 107 L.Ed.2d 708 (1990) ("The Court of Appeals have unanimously placed the burden on the defendant to demonstrate

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[5] In *Ashe,* masked gunmen robbed a group of men playing poker at a residence. *Ashe,* 397 U.S. at 437, 90 S. Ct. 1189. The government alleged that the defendant was one of the gunmen and charged the defendant with the armed robbery of one of the players. *Id.* at 438, 90 S. Ct. 1189. Neither party disputed the facts that an armed robbery had occurred and that the gunmen had taken the victim's property. *Id.* The only dispute was whether the defendant was one of the robbers. *See id.* After the jury acquitted the defendant for lack of sufficient evidence, the government prosecuted him for robbing one of the other poker players. *Id.* at 439, 90 S. Ct. 1189. According to the Court, "the jury by its verdict found that he had not [been one of the robbers]," and, under the doctrine of collateral estoppel, the second prosecution was impermissible. *Id.* at 445, 90 S. Ct. 1189.

that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding.").

To determine whether collateral estoppel bars a subsequent criminal prosecution, courts must conduct a two-step analysis. *Bolden v. Warden, W. Tenn. High Sec. Facility*, 194 F.3d 579, 584 (5th Cir. 1999). "Initially, we must decide which facts necessarily were decided in the first proceeding. Then we must consider whether the facts necessarily decided in the first trial constitute essential elements of the offense in the second trial." *Id.* Here, Defendants assert collateral estoppel bars the Government from pursuing all of the current charges against them, except for the conspiracy counts against Hirko and Shelby and the 2001 insider trading counts against Hirko.[6] We engage in this two-step analysis as to each defendant's claims below.[7]

A. Rex Shelby

Shelby was acquitted of the four insider trading counts related to his sale of Enron stock in the

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[6] For convenience purposes, we will refer to all of the counts that Defendants seek to dismiss as the "mistried counts" from this point onward. We recognize that the jury also hung on the conspiracy counts against Defendants Hirko and Shelby and the 2001 insider trading counts against Hirko. But because Defendants Hirko and Shelby do not seek their dismissal, these counts are not at issue here and are, therefore, omitted from our discussion.

[7] While Defendants all argue that collateral estoppel bars a retrial, the specifics of each defendant's argument are different. In this case, each defendant was acquitted of different counts and now seeks to dismiss different counts. Therefore, we must analyze each defendant's collateral estoppel argument separately.

summer of 2000 ("Summer 2000 Insider Trading Counts"). The jury hung on the conspiracy to commit securities and wire fraud count, the securities fraud count, the four wire fraud counts, the four insider trading counts related to trades he conducted between January and March 2000 ("Early 2000 Insider Trading Counts"), and all the money laundering counts. After the jury rendered its verdict, the district court granted Shelby's Rule 29 motion for judgment of acquittal on the money laundering counts and the wire fraud counts. Shelby now contends that, under collateral estoppel, these acquittals preclude the Government from retrying him on the securities fraud count and the Early 2000 Insider Trading Counts. This argument is unpersuasive.[8]

1. Jury Acquittals

Based on his review of the record, Shelby claims that the jury necessarily came to one of three potential conclusions when it acquitted him of the Summer 2000 Insider Trading Counts: (1) he did not withhold material information from the public, (2) there was no scheme to defraud, or (3) he lacked the intent to defraud. Because any one of these findings

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[8] Shelby does not contend that collateral estoppel applies to the conspiracy to commit securities and wire fraud count. Shelby argues, however, that, if we decided that collateral estoppel precludes the Government from retrying him on the securities fraud and the Early 2000 Insider Trading Counts, then collateral estoppel also would bar the Government from introducing some evidence in a retrial of the conspiracy count. Because we find that collateral estoppel does not bar a retrial of any of the mistried counts, we do not address this issue here.

would bar the Government from prosecuting him on the securities fraud count and the Early 2000 Insider Trading Counts, Shelby seeks dismissal of these counts.

After an extensive examination of the record, we conclude that the jury could have acquitted Shelby of the Summer 2000 Insider Trading Counts on another basis: it determined that he did not "use" undisclosed, material information when he made the sales. Shelby testified that he sold shares of his Enron stock in 2000 because he was uncomfortable with being in the stock market and that he relied on his friend David Berberian's advice as to when to sell. Moreover, in the summer of 2000, Shelby immediately exercised options that vested and promptly sold the shares that he received. Because Shelby sold those shares as soon as possible, the jury could have concluded that Shelby conducted the summer 2000 trades due to his discomfort with the stock market.[9]

Shelby argues that the jury could not have acquitted him on this basis because the jury instructions did not explain the relevance of "using" insider information to insider trading. According to Shelby, the elements of insider trading do not include the word "uses," and the district court's explanation

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[9] Shelby conducted four trades in June and July of 2000. He sold shares of Enron stock on June 26, June 27, June 29, and July 19. The sale on July 19 involved options different from those involved in the June sales, which vested in late June. It is not clear from the record, however, when the options Shelby exercised in July vested. But because the July sale was so close in time to the June sales, we find that the jury could have reasonably decided that all of the summer 2000 trades were motivated by Shelby's distrust of the stock market.

of the word "uses" does not immediately follow its instruction on the elements of insider trading.

We reject Shelby's selective reading of the jury instructions. In the jury instructions related to insider trading, the district court stated that "the law forbids [a person possessing insider information] from using that insider information in buying or selling the securities in question." The district court further explained that "[a] person 'uses' material, non-public information in connection with a stock purchase or sale if that information is a factor in his decision to purchase the stock." Therefore, these instructions were clear that the jury had to acquit Shelby of insider trading if it did not find that Shelby both: (1) had insider information and (2) was motivated by this information when he traded.

Because we find that the jury could have acquitted Shelby of the Summer 2000 Insider Trading Counts by concluding that these trades were not motivated by insider information, collateral estoppel does not preclude a retrial of the Early 2000 Insider Trading Counts and the securities fraud count. Shelby is correct that collateral estoppel would bar the Government from retrying Shelby on the Early 2000 Insider Trading Counts if the jury determined that he also did not use insider information when he conducted these trades. The jury, however, did not necessarily make this finding. In acquitting Shelby of the later counts, the jury could have differentiated between the two different sets of trades. The jury could have found that Shelby did not use insider information when he conducted the trades that underlie the Summer 2000 Insider Trading Counts but did use insider information when he conducted

the trades that underlie the Early 2000 Insider Trading Counts.

The evidence at trial supports this distinction. In the summer of 2000, Shelby traded after exercising options as soon as they vested. But from January through March of 2000, Shelby traded after exercising options that vested in June 1999. From this delay, the jury could have rationally concluded that Shelby purposely waited for the stock price to go up before exercising his 1999 options and that Shelby knew the price would go up because of his knowledge of insider information.[10] In contrast, Shelby exercised his 2000 options immediately after they vested. Thus, because the jury could have made this timing distinction, it did not necessarily make a factual determination that would bar a subsequent prosecution on the Early 2000 Insider Trading Counts.[11]

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[10] Shelby alleges that he did not exercise his 1999 options immediately after they vested because the market price of Enron stock at the time was lower than the option strike price. Moreover, Shelby contends that he exercised these options in 2000 when "they now had value." But evidence indicates that Enron stock "had value" long before the time he conducted his trades. The price of Enron stock began to rise precipitously in late November 1999. Therefore, Shelby's argument is unpersuasive because Shelby could have exercised those options in late 1999 instead of waiting until the stock price was well above the strike price.

[11] Shelby alleges that the jury could not have made a timing distinction when it acquitted him of the Summer 2000 Insider Trading Counts because neither the Government nor Shelby argued this distinction at trial. Moreover, Shelby points out that he had the same defense against all the insider trading counts: he traded because he was uncomfortable in the stock

Similarly, the four insider trading acquittals do not estop the Government from retrying Shelby for securities fraud. As discussed above, the jury could have acquitted Shelby of the four insider trading counts because it concluded that he did not use insider information in making the underlying trades. But this determination is not dispositive as to whether Shelby engaged in securities fraud. "Using" insider information in making trades is not an element of securities fraud.[12] Therefore, because the

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market, and he followed the advice of his friend, Berberian. From the evidence presented at trial, however, we find that the timing distinction is obvious and one that the jury could have made on its own. Therefore, the jury could have accepted Shelby's defense for one set of counts and not the other.

[12] The district court instructed the jury that it could convict Defendants of securities fraud if it found that the Government had proven three essential elements beyond a reasonable doubt:

> First: That in connection with the purchase or sale of Enron stock, the defendant did any one or more of the following:
>
> (1) employed a device, scheme, or artifice to defraud as charged in the Indictment; or
>
> (2) made any untrue statement of a material fact, or make the statements made, in the light of the circumstances under which they were made, not misleading as charged in the Indictment; or
>
> (3) engaged in an act, practice, or course of conduct that operated, or would operate, as a fraud and deceit on any person as charged in the Indictment;
>
> Second: That the defendant acted willfully, knowingly, and with the intent to defraud; and
>
> Third: That the defendant used, or caused to be used, any means or instrumentality of interstate commerce or of the mails.

jury could have acquitted Shelby by concluding that he did not use insider information, Shelby has not shown that the jury necessarily made a factual determination that would bar a retrial of the securities fraud count.

2. Rule 29 Acquittals

We reject Shelby's contention that his Rule 29 wire fraud acquittals collaterally estop the Government from retrying him on insider trading or securities fraud. After the jury rendered its verdict, the district court granted Shelby's Rule 29 motion for judgment of acquittal on the money laundering counts and the wire fraud counts.[13] While Rule 29 acquittals may collaterally estop the government from bringing a subsequent prosecution, *see United States v. Bernhardt*, 840 F.2d 1441, 1447-48 (9th Cir. 1988), we find that they do not preclude a retrial in this case.

As with jury acquittals, Rule 29 acquittals collaterally estop the government from relitigating only the factual issues that were necessarily decided to reach the verdict. *See id.* at 1448. Because courts issue Rule 29 acquittals, collateral estoppel in this scenario applies to the factual determinations the court, and not the jury, made to acquit. Here, the district court granted Shelby's Rule 29 motion for judgment of acquittal on the wire fraud counts because it found that there was no evidence that Shelby had any involvement with the allegedly fraudulent press releases underlying those counts.

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[13] Shelby does not allege that the Rule 29 money laundering acquittals have any collateral estoppel effect.

According to the district court, the Government could not prove that Shelby used interstate wire communications facilities to carry out an illegal scheme without this evidence.[14] Whether Shelby used interstate wire communications, however, is not essential to either insider trading or securities fraud. Therefore, we find that the Rule 29 wire fraud acquittals do not bar the Government from retrying the remaining insider trading counts or the securities fraud count.[15]

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[14] At trial, the district court instructed the jury that it could convict Defendants of wire fraud only if the Government proved:

> First: That the defendant[s] knowingly devised or intended to devise a scheme to defraud, as described in the indictment;
>
> Second: That the defendant[s] acted with a specified intent to defraud;
>
> Third: That the defendant[s] used or caused another person to use interstate wire communications facilities for the purpose of carrying out the scheme; and
>
> Fourth: That the scheme to defraud employed false material representations.

[15] Shelby asserts that the absence of evidence that he participated in the press releases establishes that he was not part of a scheme to defraud, rather than that he did not use interstate wire communications facilities. According to Shelby, he stipulated to having used interstate communications at trial. Therefore, he argues that the district court should have granted his Rule 29 motion for judgment of acquittal on the wire fraud counts by finding that he was not involved in a scheme to defraud. Moreover, he contends that we should apply collateral estoppel using this finding instead of the one the district court actually made.

Shelby's argument lacks merit. The district court was clear that it granted Shelby's Rule 29 motion because it found that he did not use interstate communications. Even assuming that

B. Joseph Hirko

Hirko was acquitted of twelve counts of money laundering related to monetary transactions he conducted in 2000 ("the Money Laundering Counts") and two counts of insider trading related to his sale of Enron stock in February and April 2000. The jury hung on the conspiracy to commit securities and wire fraud count, the securities fraud count, four counts of wire fraud, and five counts of insider trading. Hirko now contends that the acquittals on the 2000 Money Laundering Counts collaterally estop the Government from retrying him on the securities fraud count, the wire fraud counts, and the two remaining insider trading counts related to his May 2000 trades.[16] We find Hirko's argument unconvincing.

To acquit him on the Money Laundering Counts, Hirko contends, the jury must have found that he did not engage in insider trading when he sold shares of Enron stock in May 2000 or commit securities fraud or wire fraud. A party commits money laundering by "knowingly engag[ing] in a monetary transaction in criminally derived property of a value greater than $10,000." *United States v. Freeman*, 434 F.3d 369, 377 (5th Cir. 2005). At trial, Hirko stipulated to

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Shelby is correct that the district court erred in making this finding, Shelby cites no case law that allows us to apply collateral estoppel based on what the court should have found instead of what it explicitly claimed to have found.

[16] Because Hirko does not contend that collateral estoppel bars the Government from retrying him on insider trading related to his 2001 trades, we do not address these counts here. Therefore, when we refer to "insider trading" as it relates to Hirko, we are referring only to insider trading related to his 2000 trades.

having engaged knowingly in monetary transactions involving more than $10,000. Both parties also acknowledged that the bulk of the funds involved in the transactions underlying the Money Laundering Counts came from Hirko's sale of Enron stock in 2000. Therefore, Hirko argues, the only issue the jury had to decide to convict him on the Money Laundering Counts was whether his sale of Enron stock was unlawful, making these funds "criminally derived." Because of the way the Government tried the case, Hirko alleges that the jury could have found that his 2000 sales were unlawful if it concluded that he committed securities fraud, wire fraud, or insider trading.

While the Government charged him with having committed various different types of fraud, Hirko argues that the Government contended at trial that all of these fraudulent acts were part of a grand scheme to defraud the investing public. According to Hirko, the Government claimed that Defendants made material misrepresentations and omissions, thereby committing securities fraud and wire fraud, to "pump Enron's stock price" so that they could then profit from insider trading by selling their shares of Enron stock at the artificially inflated price. Under the Government's theory, all of Hirko's allegedly fraudulent acts played a role in generating the funds involved in the Money Laundering Counts, and Hirko contends that the district court instructed the jury to that effect.[17] In the jury instructions for money

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[17] The district court instructed the jury that it could convict Defendants of money laundering if it found that the Government had proven five essential elements beyond a reasonable doubt:

laundering, the district court explained that funds were criminally derived in this case if the jury determined that Hirko transacted in funds resulting from wire fraud, securities fraud, or insider trading. Therefore, Hirko contends that the jury could have acquitted him of the Money Laundering Counts only by finding that he did not commit securities fraud, wire fraud, or insider trading.

Hirko's argument falls under its own weight. Under the jury instructions for money laundering, the Government must prove that the funds transacted were "derived from a specified unlawful activity," which the district court defined as "wire fraud" or "fraud in the sale of securities." Because Hirko stipulated to the other elements, he contends that the jury concluded that he did not commit any of these acts when it acquitted him of the Money Laundering Counts. But Hirko's analysis is flawed because, under his argument, the jury must find that

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First: That the defendant engaged or attempted to engage in a monetary transaction;

Second: That the monetary transaction involved criminally derived property of a value greater than $10,000;

Third: That the property was in fact derived from a specified unlawful activity, that is, wire fraud in violation of Title 18, United States Code, Section 1343, and fraud in the sale of securities in violation of Title 15, United States Code, Sections 78j(b) and 78ff and Title 17, Code of Federal Regulations, Section 240.10b-5;

Fourth: That the defendant acted knowingly, that is, with knowledge that the transaction involved proceeds of a criminal offense; and

Fifth: That the transaction took place in the United States.

he committed "a specified unlawful activity" as a precondition to convicting him on the Money Laundering Counts. Thus, if the jury could not decide whether Hirko committed "a specified unlawful activity," then it would have to acquit him on the Money Laundering Counts.

In fact, that is seemingly what happened here. In addition to money laundering, Hirko was also charged with securities fraud, wire fraud, and insider trading, and the jury hung on these counts. Since it could not determine whether Hirko committed these acts, the jury then could not convict Hirko on the Money Laundering Counts and had to acquit. Because Hirko has failed to show that the jury necessarily found that he did not commit fraud or insider trading, collateral estoppel does not bar the Government from retrying Hirko on the securities fraud, wire fraud, and the insider trading counts.

C. F. Scott Yeager

Yeager was acquitted of securities fraud, four counts of wire fraud, and conspiracy to commit securities fraud and wire fraud. The jury hung on 20 counts of insider trading and 99 counts of money laundering. Yeager now argues that, in acquitting him, the jury necessarily found that he did not have insider information, and, therefore, collateral estoppel bars the Government from retrying him on insider trading and money laundering. For the reasons below, we find that Yeager is correct that the jury, acting rationally, could have acquitted Yeager on securities fraud only by concluding that he did not have insider information. But because Yeager was also charged with insider trading and money laundering and the jury hung on those counts, we

find that collateral estoppel, under our precedent, does not bar a retrial in this case.

1. Securities Fraud

Considering only the jury instructions, we conclude that there are four rational bases the jury could have used to acquit Yeager on securities fraud. The Government charged Yeager with securities fraud for making material misrepresentations or omissions at the 2000 analyst conference. As discussed above, the district court instructed the jury that it could convict Yeager on securities fraud only if it determined that the Government had proven three elements beyond a reasonable doubt: (1) Yeager participated in making material misrepresentations or omissions; (2) Yeager acted "willfully, knowingly, and with the intent to defraud"; and (3) Yeager used "[a] means or instrumentality of interstate commerce or of the mails." Because neither party contends that the third element is at issue, the jury must have decided, in acquitting Yeager, that the Government did not carry its burden as to the first or second elements. Two reasons the Government might not have succeeded in carrying its burden as to the first element are: (1) it failed to show there were misrepresentations or omissions made at the analyst conference; or (2) it failed to show that Yeager participated in making material misrepresentations or omissions. Two reasons the Government might not have succeeded in carrying its burden as to the second element are: (1) it failed to show that Yeager knew the presentations given at the analyst conference were fraudulent when they were made; or (2) it failed to show that any misrepresentations or

omissions Yeager made were intentional rather than negligent.

After reviewing the record, we conclude that the jury could have acquitted Yeager on the basis of the first element by concluding that there were no misrepresentations or omissions made at the conference. At trial, Defendants presented evidence that the conference presentations did not contain falsehoods and that the omitted information was not material so as to render the presentations misleading. The jury could have found this evidence convincing.

We also conclude, however, that the jury could not have acquitted Yeager by finding that, while there were misrepresentations or omissions made, Yeager did not participate in making them. While both parties acknowledge that Yeager did not give a presentation at the analyst conference, the Government argued strenuously at trial that Yeager helped shape the message of the conference presentations, which Yeager did not dispute. Under the jury instructions, Yeager participated in making material misrepresentations or omissions as long as he "caused the statement[s] to be made or the fact[s] to be omitted." Therefore, if the jury concluded that the presentations were fraudulent, the jury could not have acquitted Yeager on the grounds that he did not participate in the fraud.

From our examination of the record, we additionally find that the jury could have acquitted Yeager on the basis of the second element by finding that Yeager did not knowingly make misrepresentations and omissions because he believed the presentations were truthful. Yeager's main defense

at trial was that he thought the conference presentations were truthful because of his good faith reliance on information that he received from others. Therefore, the jury could have acquitted Yeager for this reason.

We conclude, however, that the jury could not have acquitted Yeager for negligently making material misrepresentations or omissions. The district court instructed the jury that Defendants must have been at least reckless when making material misrepresentations or omissions to be guilty of securities fraud. But it was undisputed that Yeager, as Senior Vice President of Strategic Development, helped plan the conference message. Therefore, if the jury determined that Yeager possessed information that contradicted the presentations, the jury could not have found that he was negligent in dispensing falsehoods to the public.

In sum, our review of the record demonstrates that the jury could have acquitted Yeager of securities fraud for two reasons: (1) there were no material misrepresentations or omissions made at the conference; or (2) Yeager did not knowingly make misrepresentations or omissions because he believed the presentations were truthful. Under either rationale, the jury must have found when it acquitted Yeager that Yeager himself did not have any insider information that contradicted what was presented to the public.[18] The insider trading counts are based on

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[18] The Government did not contend at trial nor does it contend here that Yeager could have discovered insider information after the conference. Therefore, if the jury found that Yeager did not have insider information at the conference, it must also have

allegations that Yeager had insider information when he conducted his trades because he knew that the information released to the public was fraudulent. Therefore, the jury seemingly made a finding that precludes the Government from now prosecuting him on insider trading and money laundering.[19] Accordingly, when we consider the acquittals by themselves, it appears that Yeager is correct that collateral estoppel bars a retrial.[20]

The problem in this case, however, is that the same jury hung on the insider trading counts. If Yeager is correct that the jury found that he did not have insider information, then the jury, acting rationally, would also have acquitted Yeager of the insider trading counts. Thus, when we consider the hung counts along with the acquittals, we are faced with a potential inconsistency, making it impossible for us to decide with any certainty what the jury necessarily

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found that he did not have insider information when he conducted his trades in the subsequent months.

[19] Yeager is charged with money laundering based on transacting in money generated from trades he conducted allegedly on the basis of insider information. Therefore, the finding that Yeager did not have insider information would also preclude the Government from retrying him for money laundering.

[20] Yeager also was acquitted of four counts of wire fraud and conspiracy to commit securities fraud and wire fraud. Yeager argues that, in acquitting him of these counts, the jury must also have found that he did not possess insider information. Because we determine that Yeager is correct that the jury must have so concluded when it acquitted him of securities fraud, it is unnecessary for us to determine whether the jury made the same conclusion when it acquitted Yeager of these other counts.

determined. Whether we can weigh hung counts in applying collateral estoppel then is crucial to our analysis. Because, as discussed below, we conclude that our precedent dictates that we must, we find that we cannot apply collateral estoppel in this case.

2. *United States v. Larkin*

We have addressed before the question of how collateral estoppel applies when the jury acquitted on some counts but hung on related counts. In *United States v. Larkin*, we rejected the defendant's assertion that the jury necessarily determined that he was not part of a conspiracy when it hung on the conspiracy count but acquitted him of various counts of vicarious liability. 605 F.2d 1360, 1370 (5th Cir. 1979), *withdrawn in part on other grounds*, 611 F.2d 585 (5th Cir. 1980). In applying *Ashe*, the *Larkin* court laid out the various rational bases on which the jury could have acquitted the defendant. *Id.* We then ruled out the possibility that the jury acquitted the defendant of vicarious liability because it found that he was not a member of a conspiracy. *Id.* at 1370-71. According to the Court, "No rational jury could have absolved [him] of [vicarious liability] because of the absence of a conspiracy between the two, while it simultaneously failed to acquit him on the conspiracy charge itself." *Id.* Therefore, *Larkin* requires that we consider mistried counts in our collateral estoppel analysis; and, in particular, under *Larkin*, the presence of mistried counts diminishes the likelihood that, in acquitting defendants on related counts, the jury made a factual determination that bars a retrial.

Yeager contends that collateral estoppel precludes the Government from retrying him for insider trading

and money laundering. According to Yeager, the jury necessarily determined that he did not have insider information when it acquitted him and that no jury can convict him on insider trading and money laundering if he did not have insider information. But even if Yeager is correct that the jury could have acquitted him on the fraud and conspiracy counts only if it found that he did not have insider information, that does not end our inquiry as to what the jury necessarily decided at trial because, under *Larkin*, we must also take into consideration the mistried counts. As we similarly noted in *Larkin*, if Yeager is correct that the jury found that he did not have insider information, then the jury, acting rationally, would have acquitted him of insider trading and money laundering. Instead, the jury hung.

The result is a discrepancy that has four possible explanations. One possibility is that the jury was irrational and came to two inconsistent conclusions. When considering the fraud and conspiracy counts, the jury decided that Yeager did not have insider information. When considering the insider trading and money laundering counts, the jury decided that Yeager had insider information but hung for other reasons. Another possibility, as the Government speculates, is that the jury decided that Yeager had insider information when considering both sets of counts, but, for some unknown reason, it nonetheless acquitted Yeager on some of them. A third possibility is that the jury decided that Yeager did not have insider information when considering both sets of counts, but, for some unknown reason, it failed to push all of them through to acquittals. Finally, a

fourth possibility is that the jury decided that Yeager did not have insider information when it acquitted him on the fraud and conspiracy counts and simply did not reach the issue when it considered the hung counts because it could not agree on whether the Government had carried its burden as to the other elements.

Because it is impossible to determine why the jury hung, we find that collateral estoppel does not bar a retrial in this case. In the first scenario, collateral estoppel would not bar a retrial because, if the jury irrationally came to two inconsistent conclusions, we cannot say that it came to any definitive conclusion. In the second scenario, collateral estoppel would not bar a retrial because the jury found that Yeager had insider information. In the third and fourth scenarios, however, collateral estoppel would preclude a retrial because the jury concluded that Yeager did not have insider information. Under *Ashe,* however, the burden is on defendants to show that the jury necessarily determined the issue that they seek to foreclose. *Brackett,* 113 F.3d at 1398. Given the evidence at trial, whether Yeager had insider information was a close issue, and the jury could have come to the conclusions in any of these four scenarios. Therefore, we cannot determine with any certainty which scenario Yeager's case falls under, and we cannot conclude what the jury necessarily decided. Because Yeager failed to carry his burden and establish what the jury necessarily decided, we find that collateral estoppel does not bar the Government from retrying Yeager on the insider trading and money laundering counts.

3. *United States v. Powell*

Finally, we note that we are not extending, at the Government's urging, *United States v. Powell,* 469 U.S. 57, 105 S. Ct. 471, 83 L.Ed.2d 461 (1984), to preclude applying collateral estoppel where a jury acquitted defendants on some counts but hung on related counts. Many of our sister circuits have rejected this argument in similar cases. *United States v. Ohayon,* 483 F.3d 1281, 1289 (11th Cir. 2007); *United States v. Romeo,* 114 F.3d 141, 144 (9th Cir. 1997); *United States v. Bailin,* 977 F.2d 270, 276 (7th Cir. 1992); *United States v. Frazier,* 880 F.2d 878, 883 (6th Cir. 1989). *Contra United States v. White,* 936 F.2d 1326 (D.C. Cir. 1991). Because our finding does not rely on *Powell,* however, these cases do not affect our analysis.

Powell bars applying collateral estoppel in cases where there are inconsistent verdicts. In *Powell,* the Court found that collateral estoppel cannot apply to reverse a conviction when the jury both acquitted and convicted defendants of related counts.[21] *Powell,* 469 U.S. at 68, 105 S. Ct. 471. According to the Court, the doctrine of collateral estoppel is "no longer useful" when the same jury reached inconsistent verdicts because collateral estoppel is "predicated on the

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[21] In *Powell,* the defendant was acquitted of various drug felonies but convicted of facilitating those felonies. 469 U.S. at 60, 105 S. Ct. 471. Because an element of the facilitation counts is that she committed the felonies that she allegedly facilitated, the defendant argued that collateral estoppel required overturning the convictions. *See id.* at 68, 105 S. Ct. 471. The Court found the defendant's argument unconvincing. *Id.*

assumption that the jury acted rationally and found certain facts in reaching its verdict." *Id.*

In the cases before our sister circuits, the Government has argued, as it does here, for an extension of *Powell*. The Government maintains that *Powell* precludes applying collateral estoppel in cases where the jury acquitted defendants on some counts but hung on related counts because this result is also inconsistent. The Sixth, Seventh, Ninth, and Eleventh Circuits rejected this argument because they found that acquittals are not inconsistent with mistried counts. *Ohayon*, 483 F.3d at 1289; *Romeo*, 114 F.3d at 144; *Bailin*, 977 F.2d at 279-80; *Frazier*, 880 F.2d at 883. As the Sixth Circuit noted, "[n]o such inconsistency is necessarily present" because "[b]oth the acquittal and the failure to agree could result from a number of factors." *Frazier*, 880 F.2d at 883.

While we arrive at what appears to be a contrary decision, we do not disagree with our sister circuits. As we acknowledged above, there are four possibilities as to how to reconcile Yeager's acquittals with the mistried counts, and only in one of these possibilities must the jury have been inconsistent. In short, we concur with our sister circuits that it is impossible to discern definitively why a jury hung. Therefore, we also reject the Government's argument because it requires us to necessarily find an inconsistency where one may not exist.

Where we part ways with our sister circuits is that they ignored the mistried counts after they determined that *Powell* does not apply. Because our precedent dictates that we weigh mistried counts, however, we cannot do the same. Under *Ashe*, the

burden is on defendants to show that the jury necessarily determined the issue they seek to foreclose in their favor. Therefore, collateral estoppel cannot apply if the uncertainty raised by the mistried counts, which we must consider under *Larkin*, precludes Yeager from meeting this burden. For the reasons above, we find that it does.[22] In sum, we agree with our sister circuits that *Powell* does not bar applying collateral estoppel when a jury acquitted defendants on some counts but hung on related counts. But we conclude that *Ashe* precludes applying collateral estoppel in this scenario because Yeager has failed to show that the jury necessarily determined that he did not have insider information.

IV.

For the aforementioned reasons, we AFFIRM the district court's denial of Defendants' motion to dismiss under the doctrine of collateral estoppel.

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[22] We can only speculate as to why our sister circuits did not also consider the mistried counts in its analysis under *Ashe*. While our precedent requires us to weigh mistried counts in determining whether collateral estoppel applies under the *Ashe* framework, the other circuits may not be similarly bound by their precedent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

UNITED STATES OF AMERICA	§	[Filed: August 31, 2006]
	§	
	§	
vs.	§	
	§	**CRIMINAL NO. H-03-93**
	§	
REX SHELBY (7)	§	

AMENDED ORDER*

Pending before the Court is Defendant Rex Shelby's Motion to Dismiss Counts 2 and 47 Through 50 of the Fifth Superseding Indictment and Counts 2 and 7 Through 10 of the Seventh Superseding Indictment, and to Prohibit the Introduction of Certain Evidence on Grounds of Collateral Estoppel **(Instrument No. 969),** filed on January 24, 2006.

I.

On March 11, 2003, the United States of America filed a multiple-count Indictment against Defendants Joseph Hirko, Kevin Howard, Scott Yeager, Rex Shelby, Michael Krautz (hereinafter "Defendants") and former Defendants Kenneth Rice and Kevin Hannon, charging them with conspiracy to commit

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* This Order was amended to correct minor citation and typographical errors prior to publication.

wire fraud and securities fraud, and substantive counts of wire fraud, securities fraud, insider trading, and money laundering. The government filed a Fourth Superseding Indictment on July 22, 2004. (Instrument No. 340). On November 5, 2004, the government filed a Fifth Superseding Indictment. (Instrument No. 468). During the relevant times in the Indictment, Defendants served in various positions as executives to Enron Communications, Inc., later renamed as Enron Broadband Services ("EBS").

In the Fifth Superseding Indictment, Count One charged Defendant Shelby with conspiracy to commit securities fraud and wire fraud. (Instrument No. 468). Count Two of the Indictment charged Defendant Shelby with the substantive offense of securities fraud in connection with alleged false statements and material omissions made at a January 20, 2000 Analyst Conference. (*Id.*). Counts Three through Six charged Defendant Shelby with the substantive offense of wire fraud in connection with press releases issued by Enron Broadband Services on January 31, 2000 through May 15, 2000. (*Id.*). Counts Forty-Seven through Fifty-Four charged Defendant Shelby with insider trading based on trades of Enron stock made on January 21, 2000 through July 19, 2000. (*Id.*). Counts One Hundred Sixty-Six through One Hundred Seventy-One charged Defendant Shelby with money laundering based on transactions on February 16, 2001 through April 7, 2002. (*Id.*).[1]

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[1] Each of the Counts against Defendant Shelby incorporated the same factual allegations stated in Paragraphs 1 through 33 of the Indictment. Specifically, each Count stated that "[t]he

On April 18, 2005, through July 13, 2005, this Court conducted a jury trial on all of the charges pending against the Defendants. On July 20, 2005, the jury returned a verdict of not guilty against Defendant Rex Shelby on four counts of insider trading (Counts 51-54). (Instrument No. 869). The jury did not enter a verdict on the conspiracy, wire fraud, and money laundering counts, or the four additional insider trading counts (Counts 47-50). As to these counts, the jury indicated that they were hopelessly deadlocked. (*Id.*).

On August 12, 2005, Defendant Shelby filed a Rule 29 Motion for Judgment of Acquittal. (Instrument No. 880). On December 14, 2005, this Court entered an Order granting Defendant Shelby's Motion for Judgment of Acquittal on Counts 3-6 (Wire Fraud) and Counts 166-171 (Money Laundering). (Instrument No. 939). The Court Denied Defendant Shelby's Motion with respect to Count 1 (Conspiracy to Commit Wire and Securities Fraud); Count 2 (Securities Fraud at the January 2000 Analyst Conference); and Counts 47-50 (Insider Trading). (*Id.*).

On November 9, 2005, the government filed a Seventh Superseding Indictment charging Defendant Shelby with conspiracy, securities fraud, and four counts of insider trading-indicating the government's intention to retry Defendant Shelby on the conspiracy, securities fraud, and insider trading counts for which the jury failed to render a verdict.

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allegations in paragraphs 1 through 33 . . . are realleged as if fully set forth here." The Counts then set forth the specific charges against Defendant Shelby. (*See, e.g.*, Count One, below).

(Instrument No. 915). The Seventh Superseding Indictment removes the counts on which Defendant Shelby either received a not guilty verdict or that the Court dismissed pursuant to Rule 29. (*Id.*). The Seventh Superseding Indictment was based on factual allegations similar to those asserted in the Fifth Superseding Indictment. (*Id.*). A comparison of the counts alleged in the Fifth Superseding Indictment and the Eighth [sic]* Superseding Indictment is set forth below.

United States v. Rex Shelby (Cr. No. 03-0093-8) Conversion Chart for Counts Relating to Rex Shelby	
5th Superseding Indictment United States v. Hirko, et al. (Cr. No. 03-0093-5)	**8th[*] Superseding Indictment, United States v. Rex Shelby (Cr. No. 03-0093-7)**
1 (Conspiracy to Commit Securities and Wire Fraud)	1
2 (Securities Fraud: 2000 Analyst Conference)	2

* [Ed. Note: This chart contains errors. Shelby was reindicted by the Seventh Superseding Indictment, not the Eighth. Moreover, his wire fraud Counts 3-6 were acquitted by Rule 29 Acquittals, not by the jury, while his insider trading Counts 51-54 were acquitted by the jury, not by Rule 29 Acquittals.]

3 (Wire Fraud-1/31/00 Press Release)	(Jury Acquittal)
4 (Wire Fraud-3/30/00 Press Release)	(Jury Acquittal)
5 (Wire Fraud-4/11/00 Press Release)	(Jury Acquittal)
6 (Wire Fraud-5/15/00 Press Release)	(Jury Acquittal)
47 (Insider Trading-Rex Shelby)	7
48 (Insider Trading-Rex Shelby)	8
49 (Insider Trading-Rex Shelby)	9
50 (Insider Trading-Rex Shelby)	10
51-54 (Insider Trading-Rex Shelby)	(Rule 29 Acquittal)
166-171 (Money Laundering-Rex Shelby)	(Rule 29 Acquittal)

On January 24, 2006, Defendant Rex Shelby filed a Motion to Dismiss Counts 2 and 47 Through 50 of the Fifth Superseding Indictment and Counts 2 and 7 Through 10 of the Seventh Superseding Indictment, and to Prohibit the Introduction of Certain Evidence on Grounds of Collateral Estoppel. (Instrument No. 969). Under the Double Jeopardy Clause of the Fifth Amendment and Doctrine of Collateral Estoppel, Defendant Shelby argues that the crimes charged in Counts 2 (securities fraud) and 47 through 50 (insider trading) of the Fifth Superseding Indictment, and Counts 2 (securities fraud) and 7 through 10 (insider trading) of the Seventh Superseding Indictment, were effectively litigated and decided against the government in the first trial. (Instrument No. 885). Defendant Shelby does not move to Dismiss Count 1 (conspiracy to commit wire and securities fraud) of the Fifth Superseding Indictment or Seventh Superseding Indictment. (*Id.*).

In support of his Motion, Defendant Shelby argues that "[t]he elements of the counts against Mr. Shelby overlap considerably and in some cases are identical, most pointedly, the 'intent to defraud' element. As a consequence, the acquittals of his later-in-time insider trading charges and the dismissals of the wire fraud charges preclude the prosecution of the remaining insider trading charges and securities fraud charge against him." (Instrument N. 970, at 1). In addition, Defendant Shelby argues that "should the Government pursue the conspiracy count against Mr. Shelby, it cannot introduce evidence going to his knowledge or intent to commit securities fraud or wire fraud." (*Id.* at 22). Specifically, Defendant Shelby argues that "collateral estoppel bars the

introduction of evidence going to (1) whether there was a scheme to make misrepresentations to the investing public, and (2) if so, whether Mr. Shelby participated knowingly and with the intent to defraud." (*Id.* at 23).

On February 13, 2006, the United States filed a Response to Defendant Shelby's Motion to Dismiss on Grounds of Collateral Estoppel. (Instrument No. 980). The government argues that "[Defendant Shelby's] reliance on generalized verdicts of acquittal on a few counts does not give rise to a conclusion that the jury or this court must have reached a decision that he did not commit the essential elements of the offenses now at issue in the Fifth and Seventh." (*Id.* at 3). In addition, the government argues that "the record of the trial . . . fatally undermines Shelby's assertion that the jury's partial verdict acquitting him on counts 51-54 and this court's judgment of acquittal on counts 3-6 means that the jury or the court determined the essential elements relating to the counts now at issue." (*Id.*). The government further argues that "[e]ven if the court were to find that the jury or the court made any finding of an essential element related to counts 2 and 47-50 of the Fifth and Counts 2 and 7-10 of the Seventh, such a finding would not bar the introduction of such evidence in the trial on the Conspiracy Count contained in the Fifth and Seventh." (*Id.*). Finally, the government contends that Defendant Shelby's Motion to Dismiss is frivolous and requests that the Court make such a finding in this Order, and proceed with trial as scheduled. (*Id.*).

II.

The Supreme Court has stated that the principle of collateral estoppel in criminal cases is embodied in the Fifth Amendment's proscription against double jeopardy. *Ashe v. Swenson,* 397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed.2d 469 (1970). Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443, 90 S.Ct. 1189. According to the Supreme Court:

> The rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of the prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.

Id. at 444, 90 S. Ct. 1189 (internal citations and quotations omitted).

In the Fifth Circuit, collateral estoppel may affect successive criminal prosecutions in one of two ways.

First, "it will completely bar a subsequent prosecution if one of the facts necessarily determined in the former trial is an essential element of the subsequent prosecution." *United States v. Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997). Second, "while the subsequent prosecution may proceed, collateral estoppel will bar the introduction or argumentation of facts necessarily decided in the prior proceeding." *Id.* (citing *United States v. Deerman*, 837 F.2d 684, 690 (5th Cir. 1988)). "Facts so established in the first trial may not be used in the second trial either as ultimate or as evidentiary facts." *United States v. Mock*, 604 F.2d 341, 343 (5th Cir. 1979).

It is axiomatic that "collateral estoppel bars relitigation only of those facts necessarily determined in the first trial." *Brackett*, 113 F.3d at 1398-99 (quoting *Deerman*, 837 F.2d at 690). "When a fact is not necessarily determined in a former trial, the possibility that it may have been does not prevent re-examination of that issue." *Id.* (quoting *United States v. Lee*, 622 F.2d 787, 790 (5th Cir.1980) (emphasis in original)). Thus, "the first step in resolving a claim of collateral estoppel is to determine which facts were 'necessarily decided' in the first trial." *Id.* at 1398 (citing *United States v. Levy*, 803 F.2d 1390, 1398-99 (5th Cir. 1986); *Mock*, 604 F.2d at 343). "At this first stage of the inquiry, the defendant bears the burden of demonstrating that the issue he seeks to foreclose was 'necessarily decided' in the first trial." *Id.* (citing *Dowling v. United States*, 493 U.S. 342, 350, 110 S. Ct. 668, 107 L.Ed.2d 708 (1990)).

In a criminal case, the determination of what the jury necessarily decided can be an "awkward" task, because "a general verdict of acquittal does not

specify the facts 'necessarily decided' by the jury." *Id.* at 1399. Thus, in making the determination of what the jury necessarily decided the court "must examine allegations of the indictment, testimony, court's instructions to the jury, and jury's verdict to consider what makes the jury's verdict coherent." *Deerman,* 837 F.2d at 690. This inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Ashe,* 397 U.S. at 444, 90 S. Ct. 1189 (quoting *Sealfon v. United States,* 332 U.S. 575, 579, 68 S. Ct. 237, 92 L.Ed. 180 (1948)). "Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." *Id.*

With these principles in mind, the Court first turns to the question of whether the government is completely barred from prosecuting Defendant Shelby on the charges contained in Counts 2 and 47 through 50 of the Fifth Superseding Indictment and Counts 2 and 7 through 10 of the Seventh Superseding Indictment. Then, the Court will determine whether the government should be prohibited from offering evidence related to the counts upon which Defendant Shelby was acquitted in the first trial.

III.

Defendant Shelby contends that the government should be barred from prosecuting him on the securities fraud and remaining insider trading counts because (1) the government argued a unifying theory of wrongdoing that makes no distinction over time or

among the counts; (2) the elements of the acquitted insider trading counts are almost identical to the elements of securities fraud, and the elements of the acquitted wire fraud counts greatly overlap those of remaining counts; and (3) because the government offered no evidence that the alleged falsehoods or Defendant Shelby's intent changed over time. To resolve the issues presented by Defendant Shelby, the Court must review, among other things, the indictment, the jury charge and verdict, the theory of prosecution, the theory of defense, and the evidence presented at trial. The complexity of this determination is underscored by the incestuous nature of the factual allegations contained in the Indictment.

A.

Paragraphs 1 through 33 of the Fifth Superseding Indictment provide a broad introduction to the Enron Broadband case and alleged schemes to defraud. (Instrument No. 468). Each of the counts on which Defendant Shelby received an acquittal (four counts of insider trading, wire fraud, and money laundering) incorporate Paragraphs 1 through 33 of the Indictment. The remaining insider trading, securities fraud, and conspiracy counts, on which the jury deadlocked, also incorporate Paragraphs 1 through 33. Paragraphs 1 through 10 of the Indictment provide a background description of the parties and Enron Broadband Services. The following Paragraphs 11 through 33, entitled "THE SCHEMES TO DEFRAUD," provide a summary of the alleged schemes to defraud, including the proposal to build the Enron Intelligent Network, a

description of alleged false press releases, alleged false statements made at the 2000 Analyst Conference, the Project Braveheart transaction, alleged false statements at the January 2001 Analyst Conference, and "The Defendants' Stock Trading." (Instrument No. 468).[2] Specifically, Paragraph 11 of the Indictment describes the overall summary of the schemes to defraud as follows:

> 11. From at least April 1999 until May 14, 2001, defendants, JOSEPH HIRKO, KEVIN HOWARD, SCOTT YEAGER, REX SHELBY, and MICHAEL KRAUTZ, together with others, engaged in conduct and made false and misleading statements and omitted material information from statements made, all of which were designed to and did deceive the investing public and others about the technological capabilities, value, revenue and business performance of EBS. The defendants executed this scheme by, among other means: (i) causing Enron to issue materially false and misleading press releases; (ii) making and causing others to make materially false and misleading statements to equity analysts and others; (iii) using fraudulent means to generate revenue so that EBS and Enron could

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[2] None of the allegations pertaining to the Braveheart Transaction, and alleged false statements at the January 2001 Analyst Conference are relevant to the charges and evidence against Defendant Shelby. Thus, the Court need not address these allegations in the context of the current Motion.

> appear to reach publicly declared financial targets; and (iv) failing to disclose material adverse information about EBS's poor business performance. During this same time period, defendants HIRKO, YEAGER and SHELBY sold large quantities of Enron stock, generating millions of dollars for themselves.

(Instrument No. 468, at 3-4).

The misrepresentations and omissions underlying both the securities fraud and wire fraud charges involve the same general topics, *i.e.,* allegedly overstating the developmental status or capabilities of the EBS network control software or Broadband Operating System ("BOS") and thereby overstating the current success of the business. The securities fraud count specifically relates to allegedly false statements and omissions at the January 20, 2000 Analyst Conference, and the wire fraud counts specifically relate to false statements and omissions contained in press releases issued by EBS. (*See Id.* "Overt Acts" at ¶ 36). In Paragraph 33 of the Indictment, the government provides a temporal link between the wire and securities fraud charges and the insider trading counts, alleging that "[a]t the time when they and others at Enron were making materially false and misleading public statements about EBS, the defendants sold large quantities of Enron stock, generating huge profits. Specifically, between January 20, 2000 and July 2000, SHELBY sold $35,230,923.89." (*Id.* at ¶ 33).

The Indictment does not differentiate what material non-public information Defendant Shelby allegedly possessed and used on each of the dates

alleged in the insider trading counts. Rather, the Indictment alleges that "while in possession of material non-public information regarding the technological capabilities, value, revenue and business performance of Enron Communications, Inc. and Enron Broadband Services, SHELBY sold shares of Enron stock . . ." (*Id.* at ¶ 50). The Indictment then lists the count number, date, number of shares, sale price, and gross proceeds of the stock sale. (*Id.*). The Seventh Superseding Indictment essentially mirrors the substantive factual allegations and format of the Fifth Superseding Indictment. (Instrument No. 915).

B.

After a 3-month trial by jury, the jury entered a verdict of "not guilty" on four insider trading counts against Defendant Shelby, including Count 47 charging Defendant Shelby with insider trading on January 21, 2000; Count 48 charging Defendant Shelby with insider trading on January 21, 2000; Count 49 charging Defendant Shelby with insider trading on February 1, 2000; and Count 50 charging Defendant Shelby with insider trading on March 22, 2000. The jury indicated that they were hopelessly deadlocked on the remaining insider trading, conspiracy, securities fraud, wire fraud, and money laundering counts against Defendant Shelby. The Court entered a mistrial on the deadlocked counts, at the request of defense counsel. Subsequently, the Court granted Defendant Shelby's Motion for Judgment of Acquittal on all of the wire fraud and money laundering counts pending against Defendant Shelby. However, the Court denied Shelby's Motion for Judgment of Acquittal on the conspiracy,

securities fraud, and remaining insider trading counts.

Defendant Shelby argues that collateral estoppel should apply in this case because the elements of the acquitted insider trading counts are almost identical to the elements of securities fraud, and the elements of the acquitted wire fraud counts greatly overlap those of remaining counts. Specifically, Defendant Shelby contends that each of the charges required the government to prove beyond a reasonable doubt that Defendant Shelby acted with the intent to defraud, and that his acquittal of four counts of insider trading and wire fraud necessarily decided that Defendant Shelby lacked an intent to defraud. Accordingly, the issue presented by Defendant Shelby ultimately asks the Court to determine whether the jury in the first trial and the Court in its Rule 29 dismissals, rationally could have acquitted him of wire fraud and four counts of insider trading without finding that he lacked an intent to defraud.

In order to establish the crime of wire fraud the government must prove beyond a reasonable doubt that the defendant (1) knowingly devised or intentionally devised a scheme to defraud; (2) acted with a specific intent to defraud; (3) used or caused another person to use interstate wire communications facilities for the purpose of carrying out the scheme; and (4) that the scheme to defraud employed false material representations. *United States v. Odiodio,* 244 F.3d 398, 402 (5th Cir. 2001); (Instrument No. 854, at 34).

In order to establish the crime of securities fraud, the government must prove beyond a reasonable doubt that (1) in connection with the purchase or sale

of securities, the defendant either (i) employed a device, scheme, or artifice to defraud, or (ii) made any untrue statement or material omission of fact, or (iii) engaged in an act of fraud and deceit; and (2) acted willfully, knowingly, and with the intent to defraud; and (3) used, or caused to be used, any means or instrumentality of interstate commerce or of the mails. (*Id.* at 26).

The crime of insider trading requires proof beyond a reasonable doubt that (1) in connection with the purchase or sale of securities, the defendant employed a device, scheme, or artifice to defraud; (2) acted willfully, knowingly, and with the intent to defraud; (3) used, or caused to be used, any means or instrumentality of interstate commerce; and (4) used material, nonpublic information in his purchase or sale of Enron stock. *United States v. Smith*, 155 F.3d 1051, 1066 (9th Cir. 1998); (*Id.* at 41-43).

Each of the crimes of wire fraud, securities fraud, and insider trading requires proof beyond a reasonable doubt that the defendant acted with the intent to defraud. Wire fraud, securities fraud, and insider trading also require a finding that the defendant devised or employed a scheme or artifice to defraud. Conversely, wire fraud and securities fraud do not require proof that the defendant used material, nonpublic information in his purchase or sale of corporate stock, whereas Shelby's acquitted counts of insider trading do require such proof. Here, the ultimate issue that Defendant Shelby seeks to foreclose from consideration is evidence that he knowingly acted with intent to defraud. *See Wright v. Whitley*, 11 F.3d 542, 546 (5th Cir. 1994) (noting that collateral estoppel "only bars relitigation of a

previously rejected factual allegation where that fact is an ultimate issue in the subsequent case"). In order to determine what ultimate issues the jury or the Court "necessarily decided," the Court will next examine the evidence presented at trial in conjunction with the essential elements of the charged offenses.

C.

Over the course of the three-month long trial of the Defendants on the Fifth Superseding Indictment,[3] the government presented a theory of prosecution that Defendants all participated in a single conspiracy aimed at falsely portraying the technological capabilities, value, revenue, and business performance of Enron Broadband Services. The government argued that the objective of the conspiracy was to increase the price of Enron stock, so that the Defendants could personally enrich themselves through stock sales, salary and performance bonuses. The government first presented evidence of the problems with EBS

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[3] The first trial on the Fifth Superseding Indictment, conducted on April 18, 2005 through July 13, 2005, included all five Defendants charged in the Fifth Superseding Indictment — Joseph Hirko, Kevin Howard, Scott Yeager, Rex Shelby, Michael Krautz. After trial, the government later severed the Defendants into three separate indictments, charging Defendants Howard and Krautz in the Sixth Superseding Indictment, charging Defendant Yeager in the Seventh Superseding Indictment, and charging Defendants Shelby and Hirko in the Eighth Superseding Indictment.

products and services leading up to the January 2000 Analysts Conference.

Specifically, the government presented evidence of problems with the Media Cast and Media Transport products. The government also presented testimony that the Interagent software did not function as network control software, and that the Enron Intelligent Network did not possess much intelligence. The government further presented evidence that the network had significant problems with security, an inability to control routers on the network, and an inability to perform billing and quality of service operations. In addition, the government presented evidence of internal arguments between EBS employees, including Rex Shelby, David Berberian, John Griebling, John Bloomer, Joe Hirko, and Scott Yeager.

As the first component of the scheme to defraud, the government presented press releases in the latter part of 1999, and testimony that the press releases did not comport with the problems facing EBS. The government further presented evidence of statements made at the January 2000 Analyst Conference. The government argued that Defendants made false and misleading statements about the EBS fiber network, proprietary software, and technological capabilities of EBS. Specifically, the government pointed to statements claiming EBS had an advanced network control software or BOS software, and argued that each statement was false, misleading, or omitted a material fact. The government further argued that Defendants continued to issue false press releases with the purpose of driving up the stock price. Finally, the government argued that Defendants

Hirko, Shelby, and Yeager sold large blocks of Enron stock, in order to take advantage of the rising stock price, which resulted from the overall scheme to defraud the investing public at the 2000 Analyst Conference and in press releases.

With respect to Defendant Shelby the government argued that Shelby failed to disclose inside information about the problems with the EIN and within EBS, at the January 2000 Analyst Conference. The government further argued that the object of Defendant Shelby's alleged participation in the scheme to defraud and failure to disclose the "truth" about EBS at the January 2000 Analyst Conference, culminated in his sale of Enron Stock when the public did not know the "truth" about EBS. The same inside information that Shelby allegedly failed to disclose at the January 2000 Analyst Conference is the same alleged inside information that the government claims Shelby possessed when he made trades of Enron stock. After the January 2000 Analyst Conference, the government introduced evidence that Defendant Shelby attended offsite meetings in February and March 2000, in which EBS employees reported on problems with EBS products, the network, and the EIN. However, the government introduced no evidence that Defendant Shelby played any role in the formation of the press releases underlying the wire fraud counts. In addition, other than the fact that Defendant Shelby remained employed at EBS and exercised Enron stock options in June and July 2000, the government introduced no evidence of the particular material non-public information that Defendant Shelby allegedly acquired or possessed during that time period.

Defendant Shelby summarizes his theory of defense and disputed issues on the insider trading counts as follows:

> At trial, Mr. Shelby did not dispute the third element of [insider trading]. He admitted attending the 2000 Analyst Conference, exercising options and selling stock shortly thereafter (the 1999 options), and exercising options and selling stocks a few months later (the 2000 Options). Rather, the disputed facts concerned whether any act or statement by Mr. Shelby was in fact untrue or misleading and part of a scheme among the defendants, and if so, whether Mr. Shelby intended to defraud.

(Instrument No. 970, at 10). In addition, Defendant Shelby asserts that one of the disputed issues at trial was whether he actually "used" any inside information in the sale of Enron stock.

Defendant Shelby's summary of disputed issues alone shows that Defendant Shelby's theory of defense could have resulted in an acquittal based on several different elements of an insider trading offense. Although Defendant Shelby asserts that the issue whether he had any "intent to defraud" was "hotly disputed" at trial, the record indicates that Defendant Shelby hotly disputed several issues at trial, including the intent to defraud, scheme to defraud, and use elements of the offense. Thus, the Court cannot, in all practicality, determine what particular issue the jury necessarily decided in acquitting Defendant Shelby of four counts of insider trading. *See Deerman*, 837 F.2d at 690 ("When a fact is not necessarily determined in a former trial, the

possibility that it may have been does not prevent re-examination of that issue.").

The Court is cognizant of the fact that the acquitted insider trading counts contain the same exact elements as the remaining insider trading counts. For this reason, Defendant Shelby argues that "[t]he acquittals on the 2000 Options insider trading counts bar re-litigation of the 1999 Options insider trading counts because no matter what element the jury resolved against the Government — scheme/misrepresentations, 'intent to defraud,' or 'use' — that finding is a necessary fact to the remaining 1999 Options insider trading counts." (*Id.* at 12). In support of his argument, Defendant Shelby contends that "[t]he Government made no argument that Mr. Shelby's knowledge or state of mind about any falsities or misrepresentations changed from January — when the 2000 Analyst Conference and 1999 Options sales took place — to June — when the acquitted 2000 Options sales took place." (Instrument No. 970, at 13).

However, the record contains no clear indication that the jury necessarily decided to acquit Defendant Shelby of four counts of insider trading solely based on a finding that Defendant Shelby lacked knowledge or an intent to defraud when he made trades of the 2000 Options. Rather, the jury could have found that the government failed to prove beyond a reasonable doubt that Defendant Shelby actually used material non-public information that he had in his possession at the time he made those trades, or that the government failed to establish that Defendant Shelby employed or devised a scheme to defraud during that time period.

Furthermore, the government presented significantly differing evidence on the alleged misrepresentations or material non-public information that Defendant Shelby possessed when he exercised the 1999 Options and the 2000 Options. As stated previously, the government presented little to no evidence that Defendant Shelby made any material misrepresentations or acquired material non-public information in June and July 2000, the dates of Shelby's acquitted counts of insider trading.[4] The only evidence that the government presented on these counts is that Defendant Shelby remained employed with EBS until August 2000, and that he exercised his stock options in June and July 2000. Conversely, the government presented substantial evidence that Defendant Shelby either made material misrepresentations or acquired material non-public information during the January 2000 Analyst Conference, February and March 2000 offsite meetings, and February 2000 emails concerning problems with BOS, the EIN, and the commercial success of Media Transport. This difference in the evidence presented at trial is sufficient to show that the jury's acquittal of Defendant Shelby for insider trading in June and July 2000, is entirely consistent with the jury's failure to acquit Defendant Shelby of securities fraud related to the January 2000 Analyst Conference and insider trading in January, February, and March of 2000.

With respect to the wire fraud counts, Defendant Shelby argues that he "did not dispute the use of

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[4] Count 51 (June 26, 2000); Count 52 (June 27, 2000); Count 53 (June 28, 2000); Count 54 (July 19, 2000).

interstate communications, but did dispute whether any scheme employing any false material representations among the defendants existed, and he did maintain that he did not knowingly devise or join any scheme, or act with specific intent to defraud." (*Id.* at 11). Similar to Defendant Shelby's defense of the insider trading counts, Defendant Shelby did not confine his defense of wire fraud to the issue of whether he acted with knowledge or intent to defraud. For example, Shelby's Motion for Judgment of Acquittal, on which the Court based its dismissal of the wire fraud counts pending against Defendant Shelby, argues as follows:

> The trial evidence shows . . . that Mr. Shelby had absolutely no involvement with the press releases at issue. The only evidence before the jury showing that Mr. Shelby had any role in the creation, review, drafting, editing, or issuance of *any* press release was from Claudia Johnson, EBS's Director of Public Relations . . . The Sun release that Ms. Johnson mentions is a January 20, 2000 press release admitted at trial as Government Exhibit PR 111. That press release was not charged in the indictment. Ms. Johnson's testimony is supported by the testimony of Government witness Kenneth Rice who, despite a week's worth of testimony, was unable to identify *any* role Rex Shelby had in the press release process.

(Instrument No. 880, at 9-10) (emphasis in original).

Accordingly, Defendant Shelby based his argument upon the third element of wire fraud, which requires a finding that "the defendant used or caused another

person to use interstate wire communications facilities for the purpose of carrying out the scheme." (Instrument No. 854, at 34). Defendant Shelby's arguments on the third element of wire fraud played a significant role in the Court's decision to grant Shelby's Motion for Judgment of Acquittal. Thus, the Court did not necessarily determine any essential element of securities fraud or insider trading, which do not require a showing that the Defendant used or caused another person to use interstate wire communications facilities for the purpose of disseminating allegedly false statements and material omissions in press releases.

A review of the allegations of the indictment, evidence presented at trial, instructions to the jury, the jury verdict, and Rule 29 dismissals, indicates that Defendant Shelby has failed to meet his burden of demonstrating that the issue he seeks to foreclose was "necessarily decided" by the jury or the Court in the first trial. *See Brackett,* 113 F.3d at 1398. Accordingly, the Court finds that the acquittal of Defendant Shelby on the wire fraud, money laundering, and four insider trading counts of the indictment, does not preclude the government from retrying Defendant Shelby for conspiracy to commit wire and securities fraud, securities fraud, and the remaining insider trading counts of the Indictment.

IV.

In the alternative, Defendant Shelby argues that "should the Government pursue the conspiracy count against Mr. Shelby, it cannot introduce evidence going to his knowledge or intent to commit securities

fraud or wire fraud." (*Id.* at 22). Specifically, Defendant Shelby argues that "collateral estoppel bars the introduction of evidence going to (1) whether there was a scheme to make misrepresentations to the investing public, and (2) if so, whether Mr. Shelby participated knowingly and with the intent to defraud." (*Id.* at 23).

The Fifth Circuit has held that "even when a subsequent prosecution is not completely barred . . . collateral estoppel may bar the admission or argumentation of *facts* necessarily decided in the first trial." *Brackett,* 113 F.3d at 1400. However, "[a] general verdict of acquittal, exculpating the defendant of liability for a substantive offense, does not estop the government from introducing the same evidence in a subsequent prosecution for conspiracy to commit the same offense." *Id.* (citing *United States v. Garza,* 754 F.2d 1202, 1209 (5th Cir.1985)). "A gen–eral verdict of acquittal merely indicates that the government has failed to convince the jury, beyond a reasonable doubt, of at least one essential element of the substantive offense; it does not 'necessarily determine' any facts at issue in the conspiracy trial." *Id.*

When the acquittal of a substantive offense does not completely bar a subsequent prosecution for conspiracy to commit the same offense, the Fifth Circuit in *United States v. Brackett* recognized the following:

> the government may introduce evidence of an alleged criminal act, notwithstanding the fact that the defendant previously has been acquitted of the substantive offense, to prove participation in a conspiracy to commit the substantive offense. Overt acts in furtherance

> of a conspiracy need not be criminal; therefore, acquittal for the substantive offense does not bar the admission of the same evidence in a subsequent conspiracy trial. Merely because appellants were acquitted of the substantive . . . charges does not mean that the facts upon which the charges were based cannot later be used as non-criminal overt acts in furtherance of the conspiracy to commit the substantive offense.

113 F.3d at 1400 (internal quotations and citations omitted).

In *Dowling v. United States,* 493 U.S. 342, 110 S. Ct. 668, 107 L.Ed.2d 708 (1990), the Supreme Court held that "an acquittal in a criminal case does not preclude the government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." *Dowling,* 493 U.S. at 349, 110 S.Ct. 668. Thus, the collateral estoppel doctrine "only bars relitigation of a previously rejected factual allegation where that fact is an ultimate issue in the subsequent case." *Wright,* 11 F.3d at 546. "A general verdict of acquittal does not [however] 'necessarily decide' an ultimate issue of fact but merely indicates that the evidence was not sufficient to prove every element of the offense beyond a reasonable doubt." *Brackett,* 113 F.3d at 1401; *see also id.* at 1401 n. 9 (stating that "*Dowling* calls into question the line of cases holding that collateral estoppel may bar the admission or argumentation of facts necessarily decided in the first trial, even if the subsequent prosecution is not completely barred.").

In order to prove the existence of a conspiracy to commit wire and securities fraud, the government must prove beyond a reasonable doubt that the defendant (1) made an agreement to commit the crime of wire or securities fraud; (2) knowingly and willfully joined into the agreement; and (3) one of the conspirators committed at least one overt act. (Instrument No. 854, at 14). In this case it is unclear what the jury "necessarily determined" when it acquitted Defendant Shelby of four counts of insider trading. As stated previously, Defendant Shelby has failed to meet his burden of establishing that the jury or the Court "necessarily determined" that Defendant Shelby lacked knowledge of a scheme to defraud or that he lacked an intent to defraud.

Although the jury and the Court may have "necessarily determined" that the government failed to prove, beyond a reasonable doubt, that Shelby used material non-public information in June and July 2000, or that Shelby participated in the actual formation of press releases, the government need not prove these facts beyond a reasonable doubt in a subsequent prosecution for conspiracy, because these facts are not ultimate issues. The ultimate issue in the conspiracy case is whether Defendant Shelby knowingly participated in a conspiracy to commit wire and securities fraud. "The admissibility of evidence relevant to an ultimate issue is governed by Fed. R. Evid. 401, which defines 'relevant evidence' as evidence 'having any tendency to make the existence' of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Brackett*, 113 F.3d at 1401-02. Evidence concerning

the material non-public information available to Defendant Shelby and the formation and dissemination of press releases is certainly relevant to the charge of conspiracy to commit wire and securities fraud, but is not required to prove the essential elements of the offense. Accordingly, collateral estoppel does not bar the government from introducing evidence originally offered in the first trial. The admissibility of that evidence is a purely evidentiary matter based on the relevance of that information.

V.

The government contends that Defendant Shelby's Motion to Dismiss on Collateral Estoppel Grounds is frivolous and requests that the Court make such a finding in this Order, so that the government may proceed with trial as scheduled. In *Abney v. United States,* 431 U.S. 651, 97 S. Ct. 2034, 52 L.Ed.2d 651 (1977), the Supreme Court recognized a statutory right to pretrial interlocutory appeal of the denial of a motion to dismiss an indictment on the basis of double jeopardy. The Court emphasized that the rights conferred under the Double Jeopardy Clause "would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence" because the Double Jeopardy Clause is not only a protection against twice being convicted, but is also a "guarantee against being twice put to trial for the same offense." *Id.* at 660-61, 97 S. Ct. 2034. *See also United States v. Angleton,* 221 F. Supp. 2d 696, 734 (S.D. Tex. 2002). The Supreme Court noted, however, that its holding may encourage "dilatory appeals,"

and that such "problems of delay" may be ameliorated by expedited appeals and procedural rules. *Id.* at 662 n. 8, 97 S. Ct. 2034.

In *United States v. Dunbar,* 611 F.2d 985, 987 (5th Cir. 1980), the Fifth Circuit set forth procedural rules for dual jurisdiction of trial and appellate courts during interlocutory appeals from orders denying motions to dismiss based on double jeopardy. The court held that:

> Henceforth, the district courts, in any denial of a double jeopardy motion, should make written findings determining whether the motion is frivolous or nonfrivolous. If the claim is frivolous, the filing of a notice of appeal by the defendant shall not divest the district court of jurisdiction over the case. If nonfrivolous, of course, the trial cannot proceed until a determination is made of the merits of an appeal.

Dunbar, 611 F.2d at 988. The court further explained that "[i]f an appeal from a motion decided to be frivolous by the district court is found meritorious by the appellate court, [a] conviction in the district court would be reversed. If found not to have merit, jurisdiction for the trial which occurred during the appeal would be affirmed." *Id.* at 989.

In *United States v. Kalish,* 690 F.2d 1144 (5th Cir. 1982), the Fifth Circuit explained that "district courts must adhere to the literal meaning of the term 'frivolous,' and that [the] court [would] carefully scrutinize . . . findings of frivolousness." *Kalish,* 690 F.2d at 1154 (stating that "[t]he whole purpose of *Abney* is defeated when district courts proceed to trial

because they do not believe the defendant's double jeopardy plea is sufficiently meritorious to warrant a stay"). The court further noted that *Dunbar* was intended to prevent *dilatory* claims, not *colorable* ones. *Id.* (emphasis added). *See also Richardson v. United States,* 468 U.S. 317, 326 n. 6, 104 S. Ct. 3081, 82 L.Ed.2d 242 (1984) (stating that "[a] colorable claim, of course, presupposes that there is *some possible validity* to a claim") (emphasis added).

In *United States v. Angleton,* 221 F. Supp. 2d 696 (S.D. Tex. 2002), the Court found that "double jeopardy claims are not frivolous when the claim is complicated or raises legal issues not clearly foreclosed by binding precedent, even if the claim is rejected on the merits." *Id.* at 736. *See e.g., United States v. Kress,* 58 F.3d 370 (8th Cir. 1995) (finding double jeopardy claim not frivolous considering the depth of the district court's analysis, notwithstanding that the Eighth Circuit found the claim unsuccessful); *United States v. McHan,* 966 F.2d 134 (4th Cir. 1992) (finding double jeopardy claim not frivolous where determination of whether indictments charged same offense required a complex analysis); *c.f. United States v. LaMere,* 951 F.2d 1106 (9th Cir. 1991) (finding that purely legal claims are frivolous when the outcome is "clear" upon "long-standing case law" binding in that circuit).

In this case, Defendant Shelby argues that his acquittal of several counts of the indictment precludes the government from re-trying Shelby on the deadlocked counts of the indictment. Specifically, Defendant Shelby argues that the unifying theory of the government's prosecution and the overlapping elements and time-frames of the acquitted and hung

counts show that the jury necessarily decided that Defendant Shelby lacked an intent to defraud, as is required in each of the charged offenses. As stated previously, however, the Court finds that Defendant Shelby has failed to meet his burden of demonstrating that the jury or the Court "necessarily decided" any ultimate issue in the first trial. Although the Court finds that Defendant Shelby's collateral estoppel argument lacks merit, the Court finds that Defendant Shelby made a good faith colorable claim of collateral estoppel, rather than a dilatory or frivolous claim with no arguable basis in fact or law.

Defendant Shelby's collateral estoppel argument required a fact-intensive analysis of the indictment, testimony, court's instructions to the jury, and jury's verdict. This case involved a lengthy multiple-count indictment with charges that alleged similar conduct, similar offenses, similar time frames, and a similar motive and intent to defraud. Thus, the fact-intensive collateral estoppel analysis required in this case, after Defendant received acquittals on several counts, greatly differs from a purely legal analysis involving dissimilar charges or dual sovereignty issues with clearly defined legal precedent. In addition, Defendant Shelby filed the present motion in a timely manner, several months prior to the scheduled trial date, indicating a good faith argument for dismissal, rather than a dilatory attempt to delay trial. Accordingly, the Court finds that Defendant Shelby's Motion to Dismiss on Collateral Estoppel Grounds is non-frivolous.

VI.

Defendant Rex Shelby's Motion to Dismiss Counts 2 and 47 Through 50 of the Fifth Superseding Indictment and Counts 2 and 7 Through 10 of the Seventh Superseding Indictment, and to Prohibit the Introduction of Certain Evidence on Grounds of Collateral Estoppel **(Instrument No. 969)** is **DENIED.**

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this 31st day of August, 2006, at Houston, Texas.

[/S/]
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-20321

[FILED:
Apr. 14, 2008]

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

SCOTT YEAGER
Defendant - Appellant

Consolidated with
Case No. 06-20593

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

REX SHELBY
Defendant – Appellant

Consolidated with
Case No. 06-20691

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

JOSEPH HIRKO

Defendant - Appellant

Appeals from the United States District Court for the Southern District of Texas, Houston

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ON PETITIONS FOR REHEARING EN BANC

(Opinion March 17, 2008, 5 Cir., _____, _____ F.3d _____)

Before HIGGINBOTHAM, GARZA and BENAVIDES, Circuit Judges.

PER CURIAM:

(X) Treating the Petitions for Rehearing En Banc as a Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. No member of the panel nor judge in the regular active service of the court having requested that the court be polled on Rehearings En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

( ) Treating the Petitions for Rehearing En Banc as a Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ FORTUNATO P. BENAVIDES
United States Circuit Judge

REHG-6A